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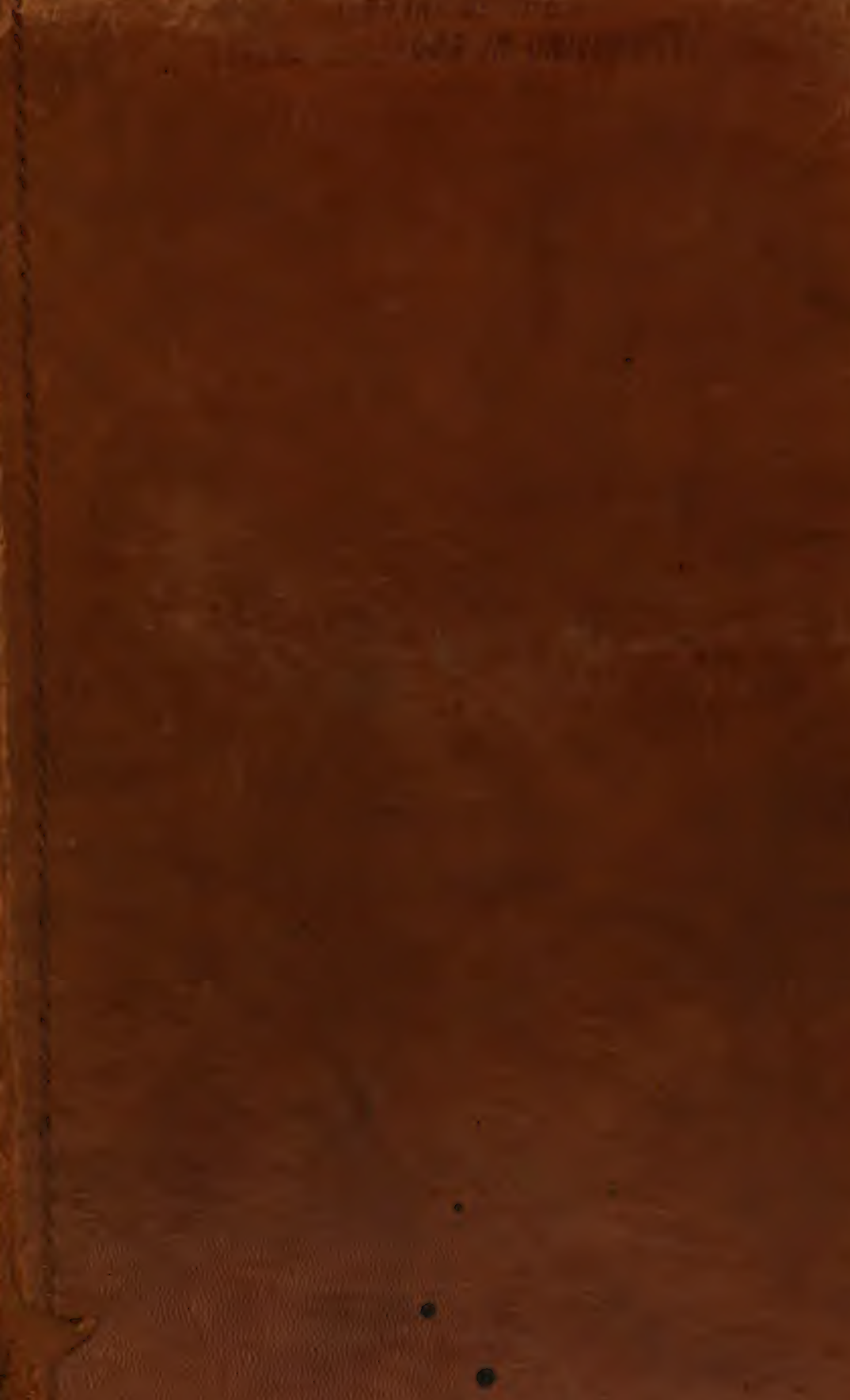
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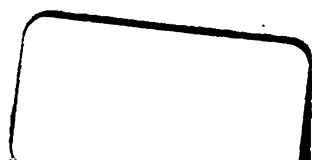
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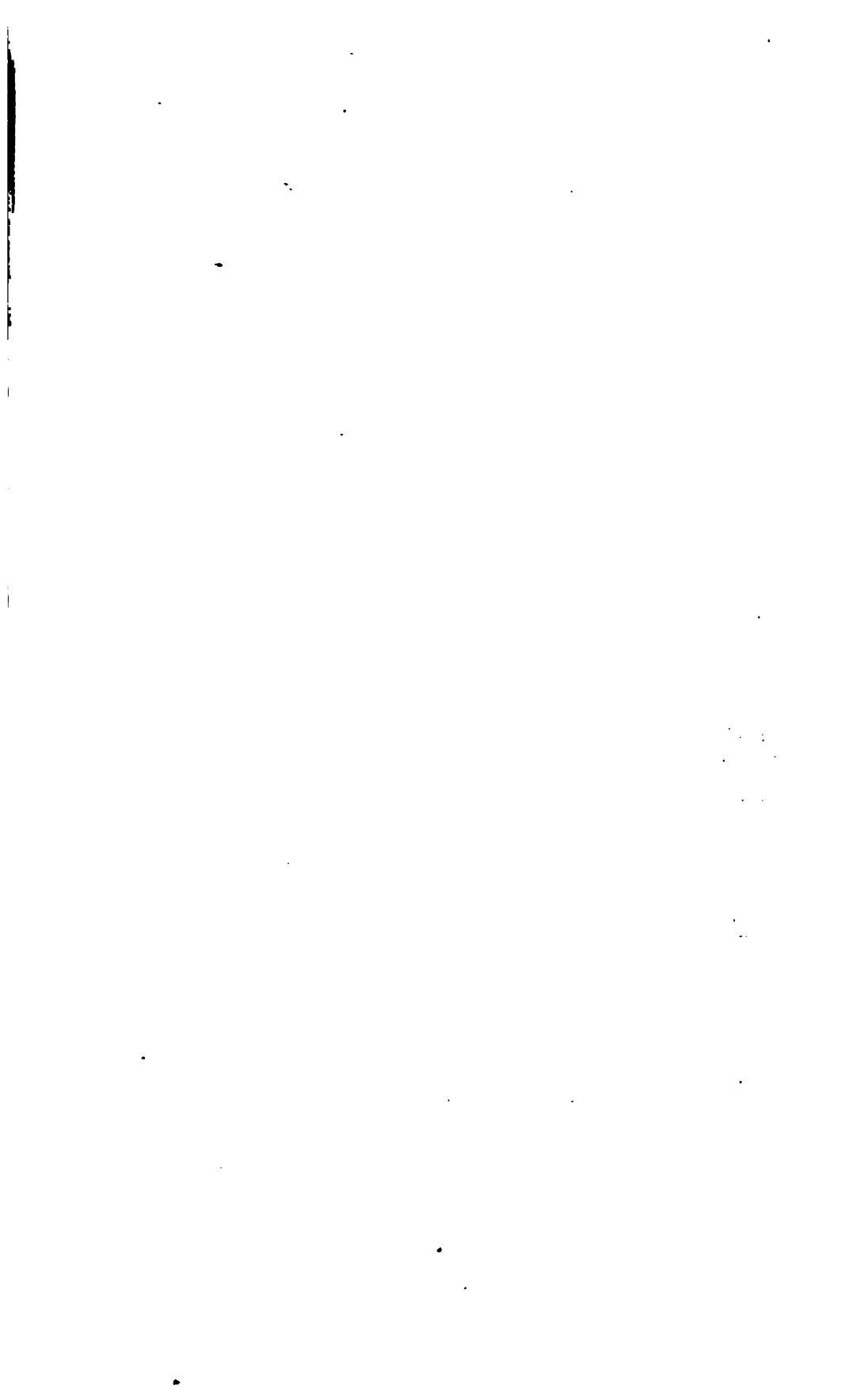
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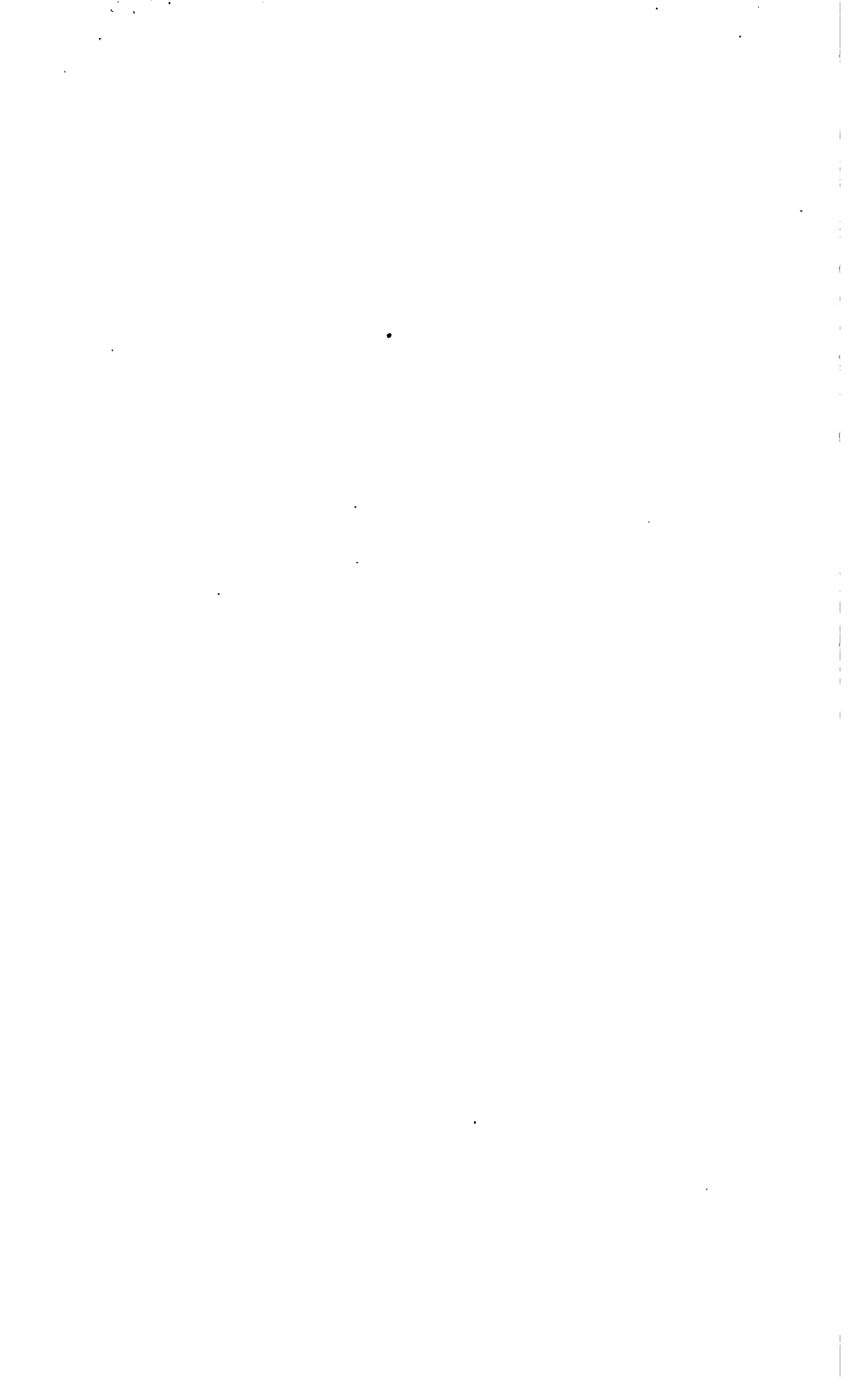
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE

High Court of Chancery,

FROM THE YEAR M DCC LXXXIX TO M DCCC XVII.

WITH A DIGESTED INDEX.

BY FRANCIS VESEY, JUN. ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

In Twenty Volumes.

VOL. V.

COMMENCING WITH MICHAELMAS TERM, XL. GEO. III. ENDING WITH THE SITTINGS
AFTER HILARY TERM, XLII. GEO. III.

FROM THE LAST LONDON EDITION, WITH THE NOTES OF FRANCIS VESEY, JUN. ESQ.
AND THE EXTENSIVE ANNOTATIONS OF JOHN E. HOVENDEN, ESQ.
OF GRAY'S INN, BARRISTER AT LAW.

THE WHOLE EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,

AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS, ESQ.

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T A B L E
OF
THE CASES REPORTED IN VOLUME FIVE.

N. B.—“VERSUS” ALWAYS FOLLOWS THE NAME OF THE PLAINTIFF.

Hoghton, Fletcher v.	. . .	550	London, Mayor, &c. of, v. Bolt	129
Holland, Bromley v.	. . .	610	Long v. Long	445
Holloway v. Holloway	. . .	399	Longlands, M ^c Lean v.	71
Holtzmeyer, Wilde v.	. . .	811	Lothian, Marquis of, v. Garforth	113
Homfray, Guest v.	. . .	818	Luders v. Anstey	213
Howe, Lord, Conolly v.	. . .	700	Lumb v. Milnes	17
Hughes, Lord Penrhyn v.	. . .	99	Lush v. Wilkinson	384
Huish, Mores v.	. . .	692		
Hunt v. Lever	. . .	147		
Hunter, Wright v.	. . .	792	M	
Hurle, Hartley v.	. . .	540		
I			Mackell, Bolger v.	509
Ingram v. Mitchell	. . .	297	Mackworth v. Thomas	329
Isherwood v. Payne	. . .	677	M ^c Lean v. Longlands	71
J			Mac Leroth v. Bacon	159
Jackson, Ex parte	. . .	357	M ^c Namara v. ————	824
" v. Cator	. . .	688	Mainwaring v. Baxter	458
James, Ex parte	. . .	708	March, Lathropp v.	259
" v. Kynnier	. . .	108	Mathews v. Warner	23
Johnston, Lord Cranstown v.	. . .	277	Mathias, Gray v.	286
K			May, Wharton v.	27
Keeling v. Brown	. . .	359	Mellish, De Visme v.	529
Kemp v. Kemp	. . .	849	Messenger, Middleton v.	136
Kidd, Roake v.	. . .	647	Middleditch v. Sharland	87
Kilvington, Barstow v.	. . .	593	Middleton v. Messenger	136
King, The v. Blatch	. . .	113	Mills v. Norris	335
" v. Taylor	. . .	806	Milnes, Lumb v.	517
Knollys v. Alcock	. . .	648	Milsom v. Awdry	465
Kynnier, James v.	. . .	108	Mitchell, Ingram v.	297
L			Montgomerie v. Woodley	522
Lathropp v. Marsh	. . .	259	Montolieu, Lady Elibank v.	737
Lawley, Thompson v.	. . .	476	Mores v. Huish	692
Leeds, Duke of, Osborne v.	. . .	369	Morton, Ex parte	449
Legh v. Haverfield	. . .	452	Moseley, Yate v.	480
Le Texier v. The Margrave of Anspach	. . .	322	Mosley v. Mosley	248
Lever, Hunt v.	. . .	147	Moth v. Atwood	845
Lewes v. Sutton	. . .	683	Murray, Nisbett v.	149
Lingham, Sturdy v.	. . .	423	Mutrie, Ex parte	576
Litchfield, Bishop of, Attorney General v.	. . .	825	N	
Loggon, Pickett v.	. . .	702	Neale v. Norris	1
			Neave, East India Company v.	173
			Nisbett v. Murray	149
			Norris, Mills v.	335
			" Neale v.	1
			Northwick, Lord Tait v.	655
			O	
			O'Callaghan v. Cooper	117
			Omerod v. Hardman	722

Osborn <i>v.</i> Brown	527	Sharland, Middleditch <i>v.</i>	87
Osborne <i>v.</i> Duke of Leeds	369	Shaw, Ex parte	620
P		Shelton, Sir William Pulteney <i>v.</i>	147
		Silcock, Snell <i>v.</i>	469
Parris, Foxcroft <i>v.</i>	221	Simpson, Pope <i>v.</i>	145
Parry, Ex parte	575	Sims <i>v.</i> Doughty	243
Parsonage, Chassaing <i>v.</i>	15	Smith, Ex parte	295
Parsons, Bank of England <i>v.</i>	665		556
“ <i>v.</i> Parsons	578	“ Pullen <i>v.</i>	706
Partridge, Sweet <i>v.</i>	148	“ <i>v.</i> Smith	21
“ Wheldale <i>v.</i>	388	Smyth, Eden <i>v.</i>	189
Payne, Lord Carrington <i>v.</i>	404		721
“ Isherwood <i>v.</i>	677	Snell <i>v.</i> Silcock	341
Penrhyn, Lord, <i>v.</i> Hughes	99	Somerville <i>v.</i> Lord Somerville	469
Pickett <i>v.</i> Loggon	702	“ Lord Bayntun <i>v.</i>	750
Pocock <i>v.</i> Reddington	794	Spencer <i>v.</i> Spencer	362
Pope <i>v.</i> Simpson	145	Spragg <i>v.</i> Binkes	583
Potter, Byne <i>v.</i>	305, 609	Studdy <i>v.</i> Tingcombe	695
Powell <i>v.</i> Evans	839	Sturdy <i>v.</i> Lingham	423
Price, Toulmin <i>v.</i>	235	Sutton, Lewes <i>v.</i>	683
“ Wells <i>v.</i>	398	Sweet <i>v.</i> Partridge	148
Pullen <i>v.</i> Smith	21	T	
Pulteney, Sir William, <i>v.</i> Shelton	147		
R		Tait <i>v.</i> Lord Northwick	655
		Tanner, Wollen <i>v.</i>	218
Randal <i>v.</i> Willis	262	Taylor, King <i>v.</i>	806
Rawlins <i>v.</i> Goldfrap	440	Thomas, Mackworth <i>v.</i>	329
Raymond <i>v.</i> Brodbelt	199	Thompson <i>v.</i> Lawley	476
Reade <i>v.</i> Reade	744	Tingcombe, Studdy <i>v.</i>	695
Reddington, Pocock <i>v.</i>	794	Tollet, Fletcher <i>v.</i>	3
Reeves, Hardy <i>v.</i>	426	Toulmin <i>v.</i> Price	235
Reynolds, Ex parte	707	Turner, De Mierre	306
Roake <i>v.</i> Kidd	647	U	
Robinson, Butterworth <i>v.</i>	709		
“ <i>v.</i> Walcot	552	Upton <i>v.</i> Lord Ferrers	801
Roddam <i>v.</i> Hetherington	91	V	
Roe, Acherley <i>v.</i>	565		
Rose <i>v.</i> Calland	186	Vawdry, Cartwright <i>v.</i>	530
Round, Bowls <i>v.</i>	508	Vez <i>v.</i> Emery	141
Russell <i>v.</i> Ashby	96	Vivian, Byne <i>v.</i>	604
S		W	
St. Albans, Duke of, Drummond <i>v.</i>	433	Wackerbath, Ex parte	574
Sayers, Ex parte	169	Walcott, Robinson <i>v.</i>	552
Seilaz <i>v.</i> Hanson	261		
Seiple, Hewart <i>v.</i>	86		

Walker, Campbell v.	678	Winchester, Bishop of, v. Bea-	
Ward, Waring v.	670	vor	113
Waring v. Ward	670	Wollen v. Tanner	218
Warner, Mathews v.	23	Wragg, Ex parte	450
Wase, Emery v.	846	Wright v. Hunter	792
Wells v. Price	398	Wynn v. Williams	130
Wharton v. May	27		
Wheldale v. Partridge	388		
White v. White	554	Y	
Wilde v. Holtzmeyer	811		
Wilkinson, Lush v.	384	Yate v. Moseley	480
Williams, Wynn v.	130	Yeo v. Frere	424
Willis, Randall v.	262		



TABLE

OF

CASES CITED IN VOLUME FIVE.

MANUSCRIPT, AND THOSE IN PRINT, IMPEACHED, CORRECTED, OR OTHERWISE
PARTICULARLY NOTICED.

THIS TABLE DOES NOT EMBRACE THE CASES CITED BY THE EDITORS.

A

<i>Addis v. Clement</i> , 478, 9.	<i>Biggleston v. Grubb</i> , 378
<i>Airey, Scott v.</i> 189, 225	<i>Bingham, Ommaney v.</i> 757 to 792
<i>Alexander v. M'Culloch</i> , 784	<i>Blakeman, Hovey v.</i> 696
<i>Andrew, Maddison v.</i> 747, 8	<i>Blaster, Burdon v.</i> 640, 1
<i>Annandale's (the Marquis of) Case</i> , 754 to 792	<i>Boddington, Witts v.</i> 503, 747
<i>Arnold, Bridge v.</i> 639	<i>Borret, Beauchamp v.</i> 608
<i>Aston v. Pye</i> , 350 to 354	<i>Bosanquet's Case</i> , 242
<i>Astry v. Astry</i> , 859	<i>Bosville v. Brander</i> , 639
<i>Atherton v. Knowell</i> , 740	<i>Bransby, Kerrich v.</i> 647
<i>Atkinson, Ellis v.</i> 694	<i>Bridge v. Arnold</i> , 639
" <i>Hill v.</i> 739	<i>Brisset, Crouch v.</i> 398
<i>Attorney General v. Coleman</i> , 180	<i>Brodie's Case</i> , 292
" " <i>v. Bishop of Ox-</i> <i>ford</i> , 302	<i>Brodrepp v. Cole</i> , 181
	<i>Brown v. Higgs</i> , 628
	<i>Bruce v. Bruce</i> , 754 to 792
	<i>Brydges v. Kilburne</i> , 689 to 691
	<i>Burdon v. Blaster</i> , 740, 1
	<i>Burrell v. Burrell</i> , 368
	<i>Byne, City of London v.</i> 683
	<i>Byrn, Price v.</i> 681

B

<i>Balfour v. Scott</i> , 754 to 792
<i>Bank of England v. Moffat</i> , 668
<i>Barnesley, Price v.</i> 539
<i>Barrington, Trinity College v.</i> 188
<i>Bayley, Harkness v.</i> 658 to 664
" <i>Snelham v.</i> 534
<i>Beauchamp v. Borret</i> , 608
<i>Bempde v. Johnstone</i> , 754 to 792
<i>Bence, Sawyer v.</i> 628

C

<i>Calmay, Medley v.</i> 108
<i>Cavendish v. Mercer</i> , 198
<i>Channel v. Churchman</i> , 292
<i>Chapman, Richardson v.</i> 504
<i>Charlton, Somner v.</i> 655
<i>Churchman, Channel v.</i> 292
<i>Clavering's Case</i> , 690

Clement, Addis *v.* 478, 9
 Clough *v.* Clough, 714, 17
 Coghlan *v.* Coghlan, 643
 Cole, Brodrepp *v.* 181
 " *v.* Mordaunt 639
 Collins, Gough *v.* 224
 Colman, Attorney General *v.* 180,
 183
 Cookson, Whelpdale *v.* 682
 Cracraft, Holbrooke *v.* 607
 Crouch *v.* Brisset, 398
 Curling *v.* May, 394

D

Damon, White *v.* 734
 De Choisieul's (Count of), Case,
 762 to 792
 De Clermont Santoignon's Case 763
 to 792
 De Courtaneon's Case, 778
 De St. Porterre's (Marquis of) Case,
 762 to 792
 Detillon *v.* Gale, 587
 Dillon's (Lord) Case, 192
 " *v.* Jones, 291
 D'Oliffe *v.* South Sea Company, 601
 Dorset (Duke of) *v.* Wilson, 828
 Douglas's (Sir Charles) Case, 757
 to 792
 Dumbell, Ex parte, 679, 683, 708

E

Eames, Trundell *v.* 747
 Edmead, Mawbey *v.* 225
 Edwards *v.* Lord Vernon, 225, 8
 Elliot, Hall *v.* 288
 Ellis *v.* Atkinson, 694

F

Fanshaw *v.* Rotherham, 187
 Fendall *v.* Nash, 197
 Fenniliteau, Ex parte, 242
 Fisher, Milbourne *v.* 685
 Fitzhenry's Case, 575

G

Gale, Detillon *v.* 587

Garnet *v.* Sellers, 639
 Gerard's Case, 640
 Glynn, Harding *v.* 501
 Godolphin, Lord, Duke of Marl-
 borough *v.* 504, 5
 Gough *v.* Collins, 224, 5, 9, 231
 Griffin's Case, 644
 Grubb, Biggleston *v.* 378
 Guise's (Duke of) Case, 762 to 792

H

Hainault's (Duchess of) Case, 778
 Hall *v.* Elliot, 288
 Harding *v.* Glynn, 501
 Harkness *v.* Bayley, 658 to 664
 Heathcote *v.* Heathcote, 382
 Higgs, Brown *v.* 725
 Hill *v.* Atkinson, 739
 Hinchinbrooke, Shipbrooke *v.* 103
 Hogg, Lashley *v.* 762 to 792
 Holbrooke *v.* Cracraft, 706
 Hovey *v.* Blakeman, 696
 Hughes, Ex parte, 679, 683, 708

I

Ingram, Shepherd *v.* 338

J

Janssen's Case, 640
 Jenkins *v.* Quinchant, 596, 601
 Johnstone, Bempde *v.* 754 to 792
 Jones *v.* ———, 520
 " Dillon *v.* 291
 " *v.* Martin, 266
 Jordan, Minshaw *v.* 292

K

Kenebel *v.* Scrafton, 663
 Kerrich *v.* Bransby, 647
 Milburne, Brydges *v.* 689, 691
 King (The) *v.* Metcalf, 438
 Knowell *v.* Atherton, 740

L

Lane *v.* Lord Stanhope, 478, 9

Lashlay *v.* Hogg, 762 to 792
 Leeds (Duke of) *v.* Munday, 341
 Lloyd, Vaughan *v.* 48
 London (City of) *v.* Byne, 683
 " *v.* Twells, 684
 Long *v.* Stewart, 800
 Lowton *v.* Lowton, 12
 Lynam, Weddell *v.* 608

M

M'Culloch, Alexander *v.* 784
 M'Namara, Rigby *v.* 655
 Maddison *v.* Andrew, 747, 8
 Marlborough, Duke of, Lord Godolphin *v.* 505, 6
 Martin, Jones *v.* 266
 Mawbey *v.* Edmead, 225
 May, Curling *v.* 394
 Mealls *v.* Mealls, 739
 Medley *v.* Calmay, 188
 Mercer, Cavendish, *v.* 195
 Metcalf, The King *v.* 438
 Milbourne *v.* Fisher, 685
 Milward *v.* Earl Thanet, 720, 821
 Minshaw *v.* Jordan, 292
 Moffat, Bank of England *v.* 668
 Montague *v.* Lord Sandwich, 386
 Mordaunt, Cole *v.* 639
 More, Parmenter *v.* 639
 Munday, Duke of Leeds *v.* 341

N

Nash, Fendall *v.* 197

O

Ommaney *v.* Bingham, 757 to 792
 Osborn, Ex parte, 242
 Oxford, (Bishop of,) Attorney General *v.* 302

P

Parmenter *v.* More, 639
 Peach *v.* Philips, 662, 3, 4
 Philips, Peach *v.* 662, 3, 4

Philips *v.* Price, 805
 Pillans *v.* Van Mierop, 143
 Pistol *v.* Riccardson, 478, 9
 Price *v.* Barnesley, 639
 " *v.* Byrn, 681
 " Philips *v.* 805
 Pulteney *v.* Shelton, 260
 Pybus *v.* Smith, 694
 Pye, Aston *v.* 350 to 354

Q

Queensberry's (Duke of) Case, 605
 Quinchant, Jenkins *v.* 596, 601

R

Riccardson, Pistol *v.* 478, 9
 Richardson *v.* Chapman, 504
 Rigby *v.* M'Namara, 655
 Rogers's Case, 575
 Rotherham, Fanshaw *v.* 187
 Russel's Case, 690

S

Sandwich (Lord), Montague *v.* 386
 Sawyer *v.* Bence, 628
 Scott *v.* Airey, 189 to 225
 Scrafton, Kenebel *v.* 663
 Sellers, Garnet *v.* 639
 Shelton, Pulteney *v.* 260
 Shepherd *v.* Ingram, 338
 Shipbrooke *v.* Hinchinbrooke, 103
 Simpson's Case, 304
 Smith, Pybus *v.* 694
 Snelham *v.* Bayley, 534
 Sumner, Charlton *v.* 655
 South Sea Company, D'Oliffe *v.* 601
 Stanhope (Lord) Lane *v.* 478, 9
 Stewart, Long *v.* 800

T

Thanet (Earl) Milward *v.* 720, 821
 Trinity College *v.* Barrington, 188

Trundell *v.* Eames, 747
Twells, City of London *v.* 684

V

Van Mierop, Pillans *v.* 143
Vaughan *v.* Lloyd, 48
Vernon (Lord) Edwards *v.* 225, 8

W

Weddell *v.* Lynam, 608
Whelpdale *v.* Cookson, 682
White *v.* Damon, 734
Wilson, Duke of Dorset *v.* 828
Witts *v.* Boddington, 503, 747

STATUTES CITED IN VOLUME FIVE.

EDWARD VI.		GEORGE II.	
2 & 3 c. 13, Tithes	229, 233	5. c. 25. Decree <i>pro</i> } <i>confesso</i> }	PAGE 1, 2 113
ELIZABETH.		5. c. 7. West Indies	277, 8
13. c. 5. Fraudulent } conveyance }	386, 867		
27. c. 4.	867		
CHARLES II.		GEORGE III.	
29. c. 3. Frauds . {	286 308 to 322 638 to 647	40. c. 36. Money to be laid } out on land and settled }	12
		17. c. 26. Annuities {	235 to 239 604 to 633
		33. c. 13. Date of Statute	238
		39 & 40. } c. 98. }	Accumulation. 460
ANNE.			
7. c. 18. Usurpation	828		
7. c. 19. Infant Trustee	240, 1, 2		

LORD LOUGHBOROUGH, Lord Chancellor.

SIR RICHARD PEPPER ARDEN, Master of the Rolls.

SIR JOHN MITFORD, Attorney General.

SIR WILLIAM GRANT, Solicitor General.

CASES IN CHANCERY, ETC.

MICHAELMAS TERM.

[40 Geo. III. 1799.]

THE following changes and promotions took place on the Bench and at the Bar in the year 1800.

On the death of Sir FRANCIS BULLER, Bart. in the Easter Vacation, Baron CHAMBRE was appointed one of the Justices of the Court of Common Pleas.

In Trinity Term Mr. GRAHAM, Attorney General to His Royal Highness the PRINCE OF WALES, was called to the degree of Serjeant at Law ; appointed a Baron of the Court of Exchequer ; and knighted.

Mr. ONSLOW was called to the degree of Serjeant at Law.

Mr. GIBBS, Solicitor General to his Royal Highness the PRINCE OF WALES, was appointed Attorney General to his Royal Highness.

Mr. SUTTON was appointed Solicitor General to his Royal Highness ; and was called within the Bar by Patent of Precedence.

Mr. ALEXANDER was appointed one of his Majesty's Counsel.

Mr. ROMILLY was appointed one of his Majesty's Counsel.

NEALE v. NORRIS.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1799, Nov. 6.]

THE Master of the Rolls refused to make an order under the statute 5 Geo. II. c. 25, s. 8, for the purpose of having the bill taken *pro confesso*, without an affidavit, according to the eighth section, that Defendant had been in England within two years before the *subpœna* issued. (a)

A MOTION was made on behalf of the Plaintiff under the statute 5 Geo. II., c. 25, s. 8, for the purpose of obtaining a decree, that the bill be taken *pro confesso*.

The affidavit in support of the motion, that the Defendant is abroad, and suggesting, that he had absconded to avoid being served with process, did not state, as is required by the eighth [*2] *section of the Act, that he had been in England within two years before the *subpœna* issued.

Mr. Owen, in support of the motion, relied on *Clarke v. Wright* (1), and the cases there referred to.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The act of Parliament is positive; and I never will conform to that case. Why should I make the order, if afterwards no decree can be made? The fact may as well be ascertained by affidavit before the order. I have talked to my Lord Chancellor upon it; and the act being so positive, I cannot conceive how any Judge can get over it. I know, there are two cases before Lord Camden and Lord Thurlow, in which the Court did not require it in point of fact: but I think, as it is previously necessary, that the fact should exist, the Court does not do its duty in beginning a long process against the party without having that fact ascertained. I never will make an order upon this act of Parliament without a positive affidavit of the Defendant's having been in England within the two years. Upon this affidavit he may have been abroad forty years. Produce an affidavit, that he has been within the realm within two years, and you shall have the order (2).

Upon the 16th of December the order for taking the bill *pro confesso* was made; all the process, required by the act, being gone through.

(a) As to the course to be pursued in order to have a bill taken *pro confesso*, see 1 Barb. Ch. Pr. b. 1, ch. 4, v. 87, *et seq.*; *Stafford v. Brown*, 4 Paige, 360; *Attorney General v. Young*, 3 V. 209, note (a), and Mr. Hovenden's notes to that case.

(1) *Ante*, vol. ii. 188. The cases there referred to are *Mason v. Polier*, in Chancery, before Lord Camden, May 16th, 1768, 1 Dick. 401; and *Gascoyne v. Kitchenam*, in Chancery, before Lord Thurlow, June 29th, 1788.

(2) See *The Bishop of Winchester v. Beavor*, *post*, 113.

BROMLEY v. HOLLAND.

[1799, Nov. 7, 8.]

PLAINTIFF in his return from attending a motion against him in the cause was arrested, and a detainer lodged against him in another action: he was discharged from both: the Court examining the parties personally, not by affidavit (a)

THE Plaintiff on the first day of Term on his return from Westminster Hall, where he had been attending a motion in the cause to dissolve an injunction, that had been obtained by him against proceeding upon annuity securities, was arrested for debt; and a detainer was lodged against him in another action.

Mr. *Leach*, for the Plaintiff, moved that he should be discharged, suggesting that the course is for the Court to examine the parties personally, and not to take an affidavit: which course was taken in the last order made upon such an occasion, in 1793, by the Master of the Rolls.

The attorney and the officer being ordered to attend, declared they had no idea, that the Plaintiff was returning from any Court.

LORD CHANCELLOR [LOUGHBOROUGH]. I take it for granted, the contempt was not wilful: but he must be discharged; and of course from the detainer also (1).

THAT a party whose attendance upon a court of justice has been required, or properly given even without a summons, is, upon general principles, protected from arrest, *cundo, morando, et redeundo*, see the note to *Ex parte Hawkins*, 4 V. 691.

(a) In reference to privilege from arrest, see 1 Smith, Ch. Pr. (Am. ed.) ch. 33, p. 390, 391.

(1) *Ante*, *Ex parte Hawkins*, vol. iv. 691; *Moore v. Booth*, iii. 350, and the note, 351.

FLETCHER v. TOLLET.

[1799, Nov. 13.]

Forty-six years after a decree directing in execution of the trusts of a will a conveyance in fee to the tenant in tail male, having also the reversion in fee, with consent of the only intermediate remainder-man in tail male, a bill was filed against their devisees; the Plaintiffs claiming under an old voluntary grant out of the reversion, the estates tail being spent and no recovery, and praying a discovery and conveyance. A general demurrer was allowed; though the decree and conveyance were stated only by way of pretence, not expressly charged; the whole right as against the Defendants being founded upon that conveyance. (a)

According to the old practice, at least down to the time of Lord Guildford, a recovery of an equitable estate was not necessary: but it was barred by deed, (b) [p. 12.]

THE bill stated, that George Tollet by his will dated the 9th of June 1718, reciting, that he had purchased a capital messuage, lands, &c. at Betley Audley in the county of Stafford, devised the same and all other his real estates whatsoever in the said county unto his daughter Elizabeth Tollet, Joseph Hayward and William Mount, (all since deceased) and their heirs, upon trust to settle and convey such part of the estate aforesaid as he should during his life by any writing or paper signed by him appoint for his younger son Cook Tollet, or for want of such appointment, such part thereof as may be most conveniently separated from the rest of the estate descended for his eldest son George Tollet, not exceeding 86*l.* improved rent per annum, for the benefit of his said younger son, as he should hereafter direct; and that they should in like manner convey all the residue of the estate to George Tollet, his eldest son, for his life, with power to limit the same or any part for jointure, and to charge for portions; and after the determination of that estate, to the use of trustees and their heirs during the life of his son to preserve contingent remainders; and after his decease to the use of his first and other sons and of the heirs male of their bodies in succession; and for want of such issue to Cook Tollet for life, with similar powers and remainders to his first and other sons in tail male; and in failure of issue male, to the use of George Tollet (the son) and his heirs for ever.

The testator then reciting, that he was possessed of tallies and orders upon annuities granted out of the Excise to the value of 400*l.* per annum, devised to his daughter Elizabeth Tollet out of the said annuities the sum of 250*l.* per annum; which he hoped
[* 4] would *amount in value to 5000*l.* which he was desirous she should have for her portion; and he directed, that the 150*l.* per annum, the remaining part of the said annuities, should be

(a) If a Bill is brought contrary to the usual course of the Court, a demurrer will hold. Story, Eq. Pl. § 643. A Bill of review and a Bill in the nature of a Bill of review are the only bills that can be brought to affect or alter a decree, unless the decree has been obtained by fraud. Mitford, Eq. Pl. by Jeremy, 206, 207; Story, Eq. Pl. § 643.

(b) See 1 Sugden, Vend. and Purch. (6th Am. ed.) 236, [327.]

sold ; and that the money arising thereby should be laid out in the purchase of land in the county of Stafford, or elsewhere, at the discretion of his executors ; and that the land to be purchased, together with such part of the said estate by him already purchased as he should appoint for that purpose, or, for want of such appointment, such part thereof, not exceeding 86*l.* per annum of the improved rent, as in the judgment of his said trustees may be most conveniently separated from the rest of the estate then already purchased, which was intended for his eldest son George Tollet, should be settled to the use of Cook Tollet for life ; with like powers to limit any part by way of jointure and to charge for portions for younger children ; remainder to trustees to preserve contingent remainders ; remainder to the first and other sons of Cook Tollet successively in tail male ; with remainders to George Tollet and his first and other sons in the same manner ; and in default of such issue to the use of George Tollet and his heirs forever : and in case George Tollet should die without issue living at his death, the testator willed, that Cook Tollet should pay to Elizabeth Tollet within a year after his brother's death, if she should be living, the sum of 2000*l.* ; and the estate so coming to him upon his brother's dying, as aforesaid, should stand charged with the payment thereof ; and a similar provision was made for Elizabeth Tollet, in case Cook Tollet should die without issue, to be paid by George Tollet, and charged upon the estate so coming to him on his brother's death.

The testator died soon after the execution of his will. His said three children, George Tollet, Cook Tollet and Elizabeth Tollet, survived him. No appointment was made by him or by the trustees since his death for his younger son ; and the said 150*l.* a-year annuity out the Excise was not sold till many years after his death ; when the same or a part was laid out in a purchase pursuant to the will. George Tollet, the son, being indebted to George Sparrow in 121*l.* and being desirous to secure the re-payment thereof with interest, and having received divers acts of friendship from John Craddock, who had advanced and paid to and for him and Cook Tollet divers sums of money to a considerable amount, became desirous to secure the re-payment thereof, together [* 5] interest, and to limit and assure the remainder or reversion in fee of and in his said father's estate under the will of his father in manner after mentioned ; and in order to effectuate his said intention, by indentures, dated the 14th of May, 1725, George Tollet, for securing the payment of the said money, and for assigning, settling, and confirming, the said premises in case of failure of issue of the respective bodies of George Tollet and Cook Tollet, did demise and grant to Thomas Stonier, his executors, &c. the said premises, so purchased by the testator, as aforesaid, (except such part of the value of 86*l.* per annum, as aforesaid, intended to be appointed for the benefit of Cook Tollet,) for the term of ninety-nine years, if George Tollet should so long live, in trust to pay George Tollet for his support and maintenance the yearly rent of 80*l.* ; and out of the residue

of the rents and profits to pay George Sparrow, his executors, &c. the said sum of 121*l*. and the interest thereof; and George Tollet also demised and granted unto John Viggars, his executors, &c. all such part or parts of said premises, as then was, or were, or ought to be, or as hereafter should be, separated from the rest of said estate, and said annuity of 150*l*., and the produce of the moneys arising from the sale thereof, subject to the payment of 2000*l*. (which has since been paid to Elizabeth Tollet out of the money arising from the sale of the said annuity of 150*l*.) and the jointure, which might be made by Cook Tollet upon any woman he might marry, and to any provision for younger children, which he should make by virtue of any power under the said will, to hold said premises and annuity from the death of said Cook Tollet without issue for the term of ninety-nine years, if George Tollet should so long live, in trust to dispose of the rents, issues, and profits, of the said last mentioned premises to and for the farther securing and paying the debts due and to become due to George Sparrow and John Craddock or either of them, and interest of such debts as should carry interest; and George Tollet thereby also demised and granted all said capital messuage, &c. and all other the lands, tenements, &c. which the testator purchased; as aforesaid, and all testator's estate and equitable interest in reversion of said annuity of 150*l*. so devised to be sold, as aforesaid, and the money thence arising, to be laid out in the purchase of lands, &c. and also said annuity of 150*l*. and all and singular the lands, &c. to be purchased with the money arising from the sale thereof, and also all other the messuages, lands, &c. whatsoever of George Tollet, the son, wherein he had or ought

[*6] to have any estate in possession, reversion, remainder * or expectancy, to hold the same premises from and immediately after the death of George Tollet and Cook Tollet and the survivor of them without issue of their respective bodies (subject to such jointure or jointures as were or should be made in pursuance of said will) unto Abel Haworth since deceased, his executors, &c. for a term of 2000 years, in trust for securing and paying the debts contracted before the date of the said indenture by said George Tollet and the interest; and then in trust for the only use and behoof of said John Craddock, his executors, &c.

It was farther witnessed, that George Tollet directed and appointed, that upon the death of him George Tollet and of Cook Tollet without issue of their respective bodies said Elizabeth Tollet, Joseph Hayward, and William Mount, and the survivors and survivor of them, and his or her heirs, and all and every other person or persons, that should be seised or possessed of said premises, should convey and assign the same and every part thereof unto and to the use of John Craddock, his heirs and assigns; and until such assignment and conveyance should stand and be seised thereof in trust for John Craddock, his heirs and assigns; and that then and from thenceforth, and after all said debts with interest should be fully paid and satisfied, said Abel Haworth, his executors, &c. should stand seised

and possessed of all and singular said premises for the remainder of said term of 2000 years in trust for John Craddock his heirs and assigns, and to attend the inheritance.

George Tollet, the son, by his will, dated the 24th of June, 1726, after making a provision for his wife Elizabeth by way of jointure, and charging 1200*l.* as a portion for such younger children as he might have by his said wife, which sum was afterwards relinquished by Charles Tollet, the only younger child, appointed his wife and John Craddock executrix and executor ; and committed to them the guardianship of his children.

George Tollet, the son, died soon afterwards, leaving George Tollet and Charles Tollet his only children, and Elizabeth, his widow (since also deceased), and also Cook Tollet, who died about July, 1738, without issue, leaving Hannah, his widow, since deceased. George Tollet, the grandson, became tenant in tail in possession of all said messuages, *lands, &c. limited to his [*7] father for life by the will of his grandfather ; and upon the death of Cook Tollet without issue he became tenant in tail in possession of all said lands, &c. limited by the will of his grandfather to Cook Tollet ; and George Tollet, the grandson, (as is alleged,) by his will, dated 22d of January, 1779, after several annuities and legacies willed and devised, that all the rest of his estate real and personal, whereof he should die possessed or entitled unto in reversion, should go unto Charles Tollet, his brother : and desired, that he would be kind to any of their relations, who descended from any brother or sisters of his grandfather ; and that if Charles Tollet had no children, the testator wished, he (Charles Tollet) would bequeath what landed estate he inherited from him (the testator) among such relations.

George Tollet, the grandson, died in 1781, without issue, a bachelor, without having done any act to bar the intails and remainders in said premises comprised and mentioned in the will of the grandfather. Upon his death Charles Tollet became tenant in tail in possession of all the lands, &c. comprised in, and directed to be purchased by, the will of the grandfather. Charles Tollet married Catherine Craddock, the youngest daughter of John Craddock (one of the Defendants) ; and he died in July 1796, without issue, and without having done any act to bar the intail and remainders ; leaving his wife surviving ; and having (as alleged) by his will appointed her and his relation George Embury executors ; and having appointed and devised certain parts of said premises to his wife for life, and after her death to Embury, his heirs and assigns for ever, and the remainder to Embury, his heirs and assigns for ever, upon consideration of his taking the name and arms of Tollet ; which he has done. Abel Haworth is dead ; and his administrator is the Defendant John Haworth.

The Plaintiffs then deduced their title from John Craddock through his eldest daughter Anastasia Fenton ; and stated, that upon the death of Charles Tollet, the jointures having fallen in, the Plaintiffs

together with the Defendant Catherine Tollet became respectively entitled to the lands, &c. before mentioned, but the Defendants Catherine Tollet and George Embury Tollet, who upon the death of Charles Tollet entered into possession of all the said lands, refuse to deliver up to the Plaintiff's possession of such parts as they are

entitled to, and to account; and in order to justify such refusal, and defeat an *ejectment lately brought against Catherine Tollet and the tenants, the Defendants pretend,

[*8] that by a decree, bearing date the 17th of November, 1753, made in a cause between Elizabeth Tollet, spinster, daughter of the first-named George Tollet, complainant, and said George Tollet, Charles Tollet, Elizabeth Tollet, widow of George Tollet, grantor in the deed of the 14th of May, 1725, and Hannah Willoughby, widow of Cook Tollet, and William Mount, Defendants, it was ordered, that said Elizabeth Tollet, spinster, and William Mount, the surviving trustees in the will of the first named George Tollet, should convey and settle said testator's real estate, subject to the respective jointures of said Elizabeth Tollet, widow, and Hannah Willoughby, to said last named George Tollet and his heirs; said Charles Tollet, his younger brother, being present in Court and consenting thereto; and that the Master should settle the conveyance, in case the parties should differ; and the Defendants pretend, that a conveyance of said premises was executed in pursuance of said decree to George Tollet, the grandson, in fee; under whose will and the will of said Charles Tollet they claim; and that Plaintiffs have no interest whatever in said premises.

The bill charged, that said decree, in case any such was made, was in a cause, in which neither Plaintiffs, nor any person, under whom they claim, were parties; nor was any notice taken in the pleadings in said cause of said indenture of 14th May, 1725. Plaintiffs insist, that the conveyance so directed was contrary to the will of the first named George Tollet; which limited said estates upon failure of issue of the bodies of his sons George Tollet and Cook Tollet to his said son George Tollet and his heirs for ever; and therefore Plaintiffs, as claiming under said last named George Tollet, the son, by virtue of said deed of 14th May, 1725, are not bound by said decree. The bill farther charged, that in case any conveyance has been made in pursuance of said decree, the same ought to be declared void; and said estates conveyed to Plaintiffs and Defendant Catharine Tollet according to their respective estates and interests. Plaintiffs say, Defendants raise objections to the deed, which they refuse to discover; and threaten to set up said decree and conveyance against any ejectment; and George Embury Tollet in Hilary Term, 1799, levied a fine of the estate devised by and purchased under the will of Tollet, the grandfather, to the use of himself in fee; and the Defendant Armistead claims some interest under the will of John Craddock. The prayer of the bill was, that the Defendants may answer, and set forth, in whose occupation the premises devised and directed to be purchased

under the will of Tollet, the grandfather, now are, the particular premises and the rents, &c. and the annual value of any part in the occupation of the Defendants; and that they may distinguish what were devised, and which were purchased after his decease; what interest the Defendant Armistead claims; and that the Defendants Catharine Tollet and George Embury Tollet may be directed to convey said messuages, lands, &c. to Plaintiffs according to their respective interests, and deliver up the title-deeds, and be restrained from setting up said decree and conveyance made in pursuance thereof, or otherwise adverse to the title of Plaintiffs, at the trial of any ejectment, which they have brought or may bring; or, if necessary, that one or more issue or issues may be directed, to try the validity of the deed of 1725.

To this bill the Defendants, the Tollets, put in a general demurrer for want of equity.

The Lord CHANCELLOR [LOUGHBOROUGH] upon the opening said, he had a doubt upon the pleadings as to the form: if the parties waived that, there was no difficulty as to the demurrer: but the doubt was, whether the defence ought not to have been by plea. They recite the decree only as matter of pretence; (a) and there is no direct statement, that there is such a decree, &c.

The *Attorney General* [Sir John Mitford], in support of the demurrer. It is sufficiently stated to entitle the Defendants to demur; for it is the ground of the relief. The bill is founded upon that. Otherwise they have no business here. Then the bill is against all the course of the Court; and therefore the demurrer is proper. The question is, whether the Plaintiffs have any right to come into equity for the purpose they state in the bill. The relief in fact sought is a conveyance. The foundation is, that by the means stated in the bill the legal estate is now vested in the Defendants, the Tollets. The question then is, whether the Plaintiffs have shown a ground in equity to take that estate out of the Defendants, and to vest it in themselves. The conveyance is void at law; for it is to take effect upon the death of the two sons without issue generally; not a conveyance of the reversion expectant upon their estates tail. *Independent of the objection to [* 10] the title of the Plaintiffs, the effect of the statement is, that nothing passed by the will of Charles Tollet; and consequently the Defendants could have nothing in them, if it stopped there; but it proceeds farther; and the bill is really filed against these two persons, as having the legal estate by force of the decree and conveyance: otherwise the bill is misconceived; and these Defendants are not necessary parties; and have nothing to do with it, if the estate remains in the trustees under the will of the original testator. The bill certainly states it only as pretence; but then it founds the

(a) Where the facts relied on as a matter of defence by the defendant, are stated in the bill only by way of pretence, and not expressly charged, it is not in general safe to demur to the bill, unless the whole right against the defendant is founded on that charge. Story, Eq. Pl. § 450.

relief upon that. In such a case clearly the Plaintiffs are not entitled to the benefit of the conveyance, and to impeach the decree. First, they are bound by the decree; supposing, they have any title whatsoever; for when the tenant in tail was before the Court, whether the decree is right or wrong, all persons in remainder are bound by it, and cannot file a bill to impeach it. The decree was made in 1753. They could not rehear the cause or file a bill of review, if they were parties. No bill of review can be filed after twenty years: *Smith v. Clay* (1). But if only two years had elapsed after the decree, and supposing the parties were not bound by it, under the circumstances what equity have they, George Tollet, the tenant in tail not dying till 1781, and Charles Tollet not till 1796? The Court would have made no decree against them; because they might have suffered a recovery; as in *Challoner v. Murhall* (2), *Dunn v. Green* (3), and *Blake v. Blake* (4), in the Court of Exchequer. Upon the merits there is no doubt; and as to the objection of form, that the defence might have been by plea, it would have been an extremely complicated plea; and if these Defendants have not the legal estate in them, there is a total defect of parties.

The Lord CHANCELLOR then observing, that the whole case was before him, and could not be more fully before him, and that this Court will never go beyond the tenant in tail in possession, and hold it necessary to make the reversioner a party to the suit, stopped Mr. *Mansfield* in support of the demurrer.

[* 11] * The *Solicitor General* [Sir *William Grant*], Mr. *Lloyd*, Mr. *Cox*, and Mr. *Wyatt*, for the Plaintiffs. The Plaintiffs state themselves to be entitled to the remainder in possession; the estate tail being spent by the failure of issue upon the death of Charles Tollet. Their title did not commence till his death in 1796. The Plaintiffs are not bound by the decree, not being parties. They could not rehear the cause; or bring a bill of review. It is true in a certain sense, the reversioner is not a necessary party to any suit, in which the tenant in tail is a party: but that cannot be applied to an adverse claim between the tenant in tail and the remainder-man and the reversioner. If the first tenant in tail was the only necessary party, why did Lord Hardwicke take that cautious step of taking the consent of the second tenant in tail? The tenant in tail is sufficient to sustain the rights of all the parties as to third persons, where the trusts of the will are carried into execution: but where the surplus of the estate, subject to the trusts, remains to be conveyed, the Court will never direct any other conveyance than according to the trusts; or if money is to be laid out in land, the Court will take care, that it shall be laid out, except where the person who would be tenant in tail of the land has himself the immediate re-

(1) Amb. 645; 4 Bro. C. C. 639, n. See also *Hercy v. Dinwoody*, ante, vol. ii. 87; 4 Bro. C. C. 257, and the note, ante, ii. 15.

(2) *Ante*, vol. ii. 524.

(3) 3 P. Will. 9.

(4) 3 P. Will. 10, Mr. Cox's note.

mainder in fee. This decree was not necessary: nor is relief prayed in that cause. If a remainder-man or reversioner is never to be heard against a decree, which cuts off his interest without a recovery, he is in the mercy of the tenant in tail; who will always submit to a decree, which cuts off the remainder without a recovery. The decree was obtained by mistake, and surprise, and upon misrepresentation; and therefore the Court will not now permit that decree to have the effect contended for; especially upon an estate of 2000*l.* a year. If it had been stated to the Court, that the reversion in fee was not in Tollet himself, immediately expectant upon the estate tail, as it was conveyed away by his father to a stranger, the conveyance in fee to him would not have been directed; by analogy to the cases, where money, to be laid out in land, has been directed to be paid to the person, who would be tenant in tail of the land, if purchased, with the immediate remainder in fee in himself, but where a recovery has been necessary, the Court would not deprive the remainder-man * of his [* 12] chance (1). In Equity the Plaintiff ought not to be bound by a conveyance directed under such circumstances. The manifest intention of the parties was to grant the reversion, such as it was. *Challoner v. Murhall*, and the other cases of that sort, proceed upon a totally different principle, and apply to a different subject. Your Lordship decided *Challoner v. Murhall* upon the principle that, the copyhold being extinct by the enfranchisement, if that was not to operate as an extinguishment of the intail, it must exist for ever; and it was so considered by the Master of the Rolls in *Philips v. Brydges* (2). So interests in the nature of intails of freehold leases for lives are barred by the act of the parties, upon the principle, that no common recovery can be suffered: nor can there be properly an intail of them: therefore the party may dispose of them. Those cases as to copyholds are clear: but that doctrine is quite new, as applied to a freehold estate. It is now settled, that an equitable recovery is just as necessary as a legal one. The demurrer goes too far; for they ought to answer as to the fact, whether

(1) See *Benson v. Benson*, *Short v. Wood*, *Chaplin v. Horner*, 1 P. Will. 131, 471, 483; *Edwards v. The Countess of Warwick*, 2 P. Will. 173; *Eyre's Case*, *Onslow's Case*, 3 P. Will. 13; *Trafford v. Boehm*, 3 Atk. 440; 1 Ves. 176; 2 Bro. C. C. 160; *Binford v. Bowden*, *ante*, vol. i. 512.

The same course has been followed under the Act, 40 Geo. III. c. 56, authorizing the Court to order money, in trust to be laid out in land to be settled, to be paid to the person, who, as tenant in tail of the land, could bar the remainders by a recovery. In *Louton v. Louton*, in Chancery, 22d July, 1800, upon a petition under that Act by the tenant for life and the first of several tenants in tail in remainder, the Lord Chancellor said, he had consulted Lord Kenyon, Lord Eldon, and the Master of the Rolls, as to the manner, in which that Act should be executed; and they had agreed, that it would be proper not to order the money to be paid out of Court, until such time as the tenant in tail might actually have suffered a recovery of the land. His Lordship accordingly made the order; but directed, that it should have no effect, unless the tenant in tail should be living on the second day of the next term; and intimated, that it would be proper to make a general order upon the subject. See the note, *ante*, vol. i. 512.

(2) *Ante*, vol. iii. 120.

there has been a conveyance under the decree. The Plaintiffs only wish to prevent the legal estate from being set up against an ejectment. If the reversioner had been before the Court, and had refused his consent, this conveyance would not have been directed: then surely the Court will not let them take advantage of that done behind his back.

LORD CHANCELLOR [LOUGHBOROUGH]. According to the old practice of the Court, at least down to the time of Lord Guildford, a recovery of an equitable estate was not necessary: for it was [* 13] barred by deed. *It is surprising, how it was ever altered. An unreasonable doubt then struck him, whether a recovery was not necessary (1).

Upon reading this bill I had a little doubt upon the form of the defence, by demurrer: though it struck me, that this decree must, if this Court means to act as a Court of Equity, and does not lend itself to the purposes of injustice, be a complete protection to the parties, who claim under it. I had a little doubt, whether the decree ought not to have been more formally set out, and the effect stated at the bar. However, according to the opinion I have formed upon the whole case, I think, the demurrer meets the case made by the bill in every way, and upon every supposition, upon which that case can be stated; and upon the foundation of the case, supposing the conveyance was executed, the demurrer is an answer to the Equity; and if the conveyance was not executed, the demurrer is equally an answer; for it distinctly states, that as between the parties in this cause there is no case, in which a Court of Equity can interfere. The justice of the case is perfectly evident. The original title gives an estate for life to George Tollet, the son, with remainders to his first and other sons in tail male; remainder to his brother, Cook Tollet, for life, and to his first and other sons in tail male; and, after the determination of these estates in tail male, the reversion in fee was to be conveyed to the heirs of the testator, with a great many charges in favor of daughters. George Tollet, possessing under this title, by a deed, purely private and relating to his own affairs, upon which it is manifest he was under some little difficulty at the time, having borrowed money from Sparrow, and was likely to contract other debts, for the purpose of discharging which he was to reduce his income to fourscore pounds a-year, makes a provision for his debts; and then follows a conveyance of a reversionary interest in the estate: but it is clear and distinct that was not the reversion in fee after the determination of the estates tail: for, whatever motives he might have, purely voluntary, upon no pecuniary consideration, he did not mean to give it to the disappointment of his own issue female or the issue female of his brother. In process of time he is succeeded by his son. All the particular debts of that tenant for life were satisfied. A bill was filed in 1753 by a daughter, entitled to a considerable charge, to have her money

(1) *Radford v. Wilson*, 3 Atk. 815.

raised: the particular trusts had been executed, and lands purchased; and the bill prayed generally, that the trustees may execute the trusts, and, the trusts executed, convey according to the limitations of the will of the first George Tollet. The only persons made parties to that bill were the two grandsons, each entitled by the effect of the will to estates tail, and the trustees, all the parties appearing to be necessary; and it was quite obvious there was no disclosure of this private deed by the tenant for life, and no object in the suit, that could lead to an inquiry into that. I have no doubt, the decree was made upon the supposition, that the reversion had descended to George Tollet. Taking that for granted, the decree very properly takes the consent of Charles Tollet, the next remainder-man in tail. That decree was executed, or it was not. If not, the Plaintiffs have no business here against these Defendants. Being executed, as the bill states it was, by the order of the Court, upon the ignorance, not the mistake, of the Court, (ignorance is not mistake,) but upon the ignorance of all the parties, that there existed any such deed as is now brought forward, the conveyance has been made; and I am desired at this distance of time, forty-six years, by a party stating a title under that voluntary conveyance, to do what? They suppose it mistake. I am to say, Lord Hardwicke committed that mistake. Am I desired to do an act of justice? No: but an act of the grossest injustice; for if this title had not been ordered to be made by the trustees, and the fact had been known, and the trustees had stood out, the Tollets had at all times the power to put an end to that deed by a common recovery. It sometimes happens by mistakes in conveyancing, that persons get a legal title, which it is to be wished had not been the case. But I am desired to do a singular thing. It goes perfectly according to the justice of the case. The parties living many years afterwards, and having each a title to bar, have rested upon the decree, and not done the act. A Court of Equity would be a nuisance, if it gave so little effect to its own acts: and if that decree against all justice and equity should be reversed, to let in a volunteer to take the effect of a legal conveyance, which, if it had been notified and produced, it is impossible any one would have permitted to take effect.

I am clearly of opinion, therefore, that the demurrer ought to be allowed.

1. As a general rule, adopted upon principles of convenience, Courts of Equity consider a tenant in tail as having the whole estate vested in him, at least for the purposes of suit; and a decree against him will bind the remainder-man; *Loyd v. Jones*, 9 Ves. 57; *Giffard v. Hort*, 1 Sch. & Lef. 407; for, though in many cases, where it has been held sufficient to bring before the Court the person having the first estate of inheritance, it cannot be denied, that persons having immediate and valuable interests in the same real estate, may be most deeply affected by a decree made in their absence; yet the convenient administration of justice renders this necessary. *Cockburn v. Thompson*, 16 Ves. 326; *Reynoldson v. Perkins*, Amb. 565.

2. It is now well settled, that the tenant in tail of a trust estate can no more

bar the issue in tail, or remainder-men, without a recovery, than the tenant in tail of a legal estate could do: *Kirkham v. Smith*, Amb. 518: it is of the utmost importance to preserve a strict analogy between legal and equitable estates, and to apply the same rules to both. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 148; *Salvin v. Thornton*, 1 Brown, 72, n. But the quasi tenant in tail of a freehold lease held for lives, may, by surrendering the lease, and taking a new one to himself, bar the remainders over: *Grey v. Mannock*, 2 Eden, 339; *Blake v. Blake*, 1 Cox, 266; *Blake v. Luxton*, Coop. 178; *Moody v. Walters*, 16 Ves. 313. The doubt, however, which Lord Kenyon threw out incidentally, in *Doe v. Luxton*, 6 T. R. 293, whether the first taker of such a lease might not bar the remainders over by his will alone, has been explicitly repudiated by Lord Redesdale, in *Campbell v. Sandys*, 1 Sch. & Lef. 296. An estate tail in a copyhold may be barred by a surrender of the entire estate; for upon a readmission a new estate arises; and by the total extinguishment of the old estate the remainders appendant thereon must necessarily be destroyed. *Oakeley v. Smith*, 1 Eden, 266. And see, *ante*, the note to *Challoner v. Marshall*, 2 V. 524.

[* 15]

CHASSAING v. PARSONAGE.

[ROLLS.—1799, Nov. 11, 14.]

UPON a marriage with a ward of the Court under gross circumstances a proposal for a settlement of the wife's fortune, giving the husband in the event of his surviving her a life interest, was rejected; and the Court refused even to pay out of the accumulation his debts, chiefly contracted in the maintenance of his wife and children. (a)

JOHN THOMAS by his will gave two leasehold houses and all the residue of his estate and effects to William Stone and Antoine Bernard Francois Chassaing, upon trust to convert the same, except the houses, into money, and to place the residue out at interest; and, after a provision for the maintenance of Ann Clay out of the interest, he directed the surplus to accumulate; and if she should marry before the age of twenty-one with consent of the trustees he directed them to pay to her three fourths of such residue for her own use, and to pay the remainder to her within one month after her attaining the age of twenty-five, for her own use; and if she should remain single until the age of twenty-one, then to pay and transfer the whole of the said residue and accumulation to her for her own use: but if she should marry under twenty-one without such consent, then within one month after such marriage to raise 200*l.* and pay the same to her, and to stand possessed of 500*l.* farther part there-

(a) Where a husband has married a ward without the consent of the Court, the ward's interest, and that alone, is to be consulted in framing the settlement; unless the subordinate purpose of protection against the husband, can be accomplished without prejudice to the ward. *Birkett v. Hibbert*, 3 My. & Keen, 227. Where her interest will suffer, the punishment of the husband, or the restraining the husband from reaping any advantage, is not to be regarded in settling the wife's estate. *Ib.* If the Court gets a control over the property, which belonged to the wife before marriage, her right to a settlement is preserved, except she comes into Court to waive that right. *In the Matter of Anne Walker*, Lloyd & G. Temp. Sugd. 299; *S. C.* Lloyd & G. Temp. Plunk. 136, 533.

of, upon trust to pay the interest thereof to her for her separate use ; and after her decease for her children, as therein mentioned.

By a decree made on the 17th of May, 1791, in the original suit instituted against the trustees the usual accounts were directed ; and under that decree the debts, legacies, &c. were paid.

Ann Clay eloped from a boarding school with Chassaing ; who was employed to instruct her. They went to France ; where they cohabited : but they were not married till she had attained the age of twenty-one. At the time of the elopement another woman lived with Chassaing as his wife.

By an order made upon the 22d of July, 1796, an inquiry was directed under what circumstances Ann Chassaing left the school ; where she had since lived ; at whose expense ; at what time she married, and with whom ; and it was directed, that the Plaintiff should be at liberty to lay before the Master a proposal for a settlement.

* The Master by his report, dated the 25th of March, 1797, [* 16] stated the circumstances of her leaving the school, and the manner, in which she had since lived with Chassaing ; and that it appeared by a certificate under the seal of the municipality of Dunkirk, that a ceremony of marriage took place between them upon the 21st of June, 1794, at Dunkirk ; and upon the 15th of June, 1796, a marriage ceremony took place between them in England : but the woman, who passed for the wife of the Plaintiff, being living, and having for many years lived with him as his reputed wife, the Master stated, that it appeared very doubtful to him, whether the marriage with the Plaintiff Ann Chassaing was valid. He also stated, that the Plaintiff Chassaing had declined laying any proposal for a settlement before him.

On the 30th of March, 1797, it was ordered, that 155*l.* cash in the Bank, should be paid to the Plaintiff Ann Chassaing for her separate use ; directions were given for paying the costs of the parties ; and it was ordered, that the Plaintiff Chassaing should lay a proposal before the Master.

On the 12th of December, 1797, the Master certified, that Chassaing had not laid any proposal before him, though summoned for that purpose. A farther report in 1798 stated, that Chassaing had laid a state of facts and a proposal before him ; setting forth the funds ; and that from the summer of 1791 he had supported his wife Ann and her two children in a suitable manner and at a considerable expense ; and the only part of her fortune, which had ever been applied for that purpose, was 200*l.* and the sum of 155*l.* paid to her out of the cash in the Bank ; that 499*l.* 14*s.* 4*d.* cash, and a considerable part of the Bank Annuities, had been produced by the accumulation of her fortune subsequent to 1791 : that Chassaing having expended great part of his own private fortune in the maintenance and support of her and her children, and having also

contracted debts for that purpose, and being otherwise indebted to sundry persons, whose demands he had not ability to discharge, except by means of the trust funds in this cause, it was therefore proposed by him and his wife as for the benefit of themselves and their children, that in making the settlement after proposed a sufficient part of the trust funds be appropriated for the discharge of all his debts; and after the payment thereof he proposed,

[* 17] * that the residue be vested in trustees, upon trust to receive the dividends and annual proceeds, as they should become due; and from time to time during the life of Ann Chassaing to pay, apply and dispose of, the same to such person and persons, and for such intents and purposes, as she by any writing or writings, signed with her own hand, should, whether covert or sole, and notwithstanding her coverture (but so as the same was not by way of anticipation (1),) direct or appoint; and in default of such direction or appointment, and in the mean time and until such direction, to pay the same into the proper hands of Ann Chassaing, and for her own separate and peculiar use and benefit; and after her decease out of the said trust funds to raise and pay any sum not exceeding 500*l.* to such person or persons, upon such trust, and for such intents and purposes, as she by her last will, or any writing purporting to be or in the nature of a will, with two witnesses, should, whether covert or sole and notwithstanding her coverture, appoint; and after her decease, in case her said husband should sur-

(1) A clause of this nature has been introduced into these settlements in consequence of the decision in *Pybus v. Smith*, ante, vol. I. 189; 3 Bro. C. C. 340; where, though the trust was to pay the rents and profits according to appointment from time to time, a general sweeping appointment was established, upon the ground, that a married woman is to be considered as a *feme sole* with respect to her separate estate. The propriety of admitting that doctrine in the extent, to which it has been pushed by some late cases, was questioned by the Master of the Rolls in *Hyde v. Price*, and by the Lord Chancellor in *Whistler v. Newman*, ante, vol. iii. 473, iv. 129; and the principles, upon which those doubts rest, received a strong confirmation in the judgment, pronounced in the Exchequer Chamber by Lord Eldon upon a very able review of the subject, in *Beard v. Webb*, 2 Bos. & Pul. 93, reversing the judgment of the Court of King's Bench against a *feme covert*, sole trader by the custom of London. The law was finally settled by the decision upon the opinion of all the Judges in *Marshall v. Rutton*, 8 Term, Rep. B. R. 545, against the capacity of a married woman, though living apart from her husband, and having a separate maintenance secured by deed, to contract debts and be sued as a *feme sole*. *Post*, vol. xi. 529, 530; *Carlisle v. Starr*, 9 Pri. 161. The following cases in this Work, *Fettiplace v. Gorges*, *Pybus v. Smith*, *Lillia v. Airey*, vol. i. 46, 189, 277; *Milnes v. Bust*, ii. 488; *Sperling v. Rochfort*, *Chesslyn v. Smith*, viii. 164, 183; *Rich v. Cockell*, *Jones v. Harris*, *Wagstaff v. Smith*, ix. 369, 486, 520; *Parkes v. White*, xi. 209; *Witts v. Dawkins*, xii. 501; *Sturgis v. Corp*, xiii. 190; *Essex v. Atkins*, xiv. 342; *Heatley v. Thomas*, xv. 596; *Dalbiac v. Dalbiac*, xvi. 116; *Bullpin v. Clarke*, xvii. 365, xviii. 434; *Gullan v. Trimbe*, 2 Jac. & Walk. 457; *Stuart v. Viscount Kirkwall*, 3 Madd. 387; 1 Turn. 100, establish the right of a married woman in equity to deal with her separate property, as a *feme sole*, in opposition to *Whistler v. Newman* and *Mores v. Huish*, post, 692; but she cannot during coverture affect property settled upon her, surviving her husband, absolutely; *post*, *Richards v. Chambers*, vol. x. 580; *Lee v. Muggeridge*, 1 Ves. & Bea. 118; *Pickard v. Roberts*, 3 Madd. 384; *Stamper v. Barker*, 5 Madd. 157; *Acton v. White*, 1 Sim. & Stu. 429.

vive her, to pay the interest, dividends, and annual proceeds of so much of the funds as remained to him for life; and after the decease of the survivor to assign, transfer, and pay, the remaining funds, and the dividends, &c. to and among all the children of Ann Chassaing, lawfully to be begotten, in such shares, at such age or respective ages, days, or times, and subject to such provisos, conditions, and limitations over, (such limitations over being for the benefit of some or one of such children) and in such manner, as she by deed or will, &c. should appoint; and, in default of appointment, or as to so much, concerning which there should be no appointment, to and among all and every her child and children *equally, [* 18] to be vested in the sons at the age of twenty-one, in the daughters at that age or marriage, with benefit of survivorship; and if all should die, before he, she, or they, should be entitled to any vested interest, upon trust after the decease of Chassaing, in case he should die in the life of his said wife, to transfer the remaining funds to her or her assigns, for her own proper use and benefit; but in case she should die in his life, and there should be a default of issue as aforesaid, then from and after the determination of his life estate therein to transfer so much as should remain according to her appointment by will, &c.; and in default of appointment and as to so much, whereof there should be no appointment, to her executors, &c. as her personal estate; with the usual provisions for the maintenance and advancement of the children with the consent of her, or of him surviving her, and for changing the securities; and that the husband and wife and the trustees might revoke the uses and declare new uses.

The Report farther stated, that the debts of Chassaing proposed to be paid out of the fortune of his wife amounted to 1572*l.* 14*s.* 6*d.*; which would exhaust so great a part of her fortune, that the Master had not thought fit to approve the proposal; and that in cases, where the husband has no fortune to settle, the Court has thought it right to narrow the husband's interest to one half of the produce of her fortune, in case he survives her, and there are children (1): but this proposes to give him the whole income in such a case. But besides that special objection, the Master apprehending, that the principal object of the Court in such cases is to take care of the interests of the wife and children, and not to give the husband who had married her under circumstances immoral or dishonest, or which the Court could not approve, advantages, which in the usual course of business upon a fair and open treaty of marriage the Court would not give, upon that general principle as well as upon the particulars of the proposal thought fit to disallow it.

Upon this Report a petition was presented by Chassaing and his wife; stating the amount of the funds, consisting of 6295*l.* 3*s.* 4*d.*

(1) *Stevens v. Savage*, ante, vol. i. 154, and the note, 155. In settlements under such circumstances the Court also takes care to secure to the wife the capacity of making a provision for a second marriage. *Winch v. James*, ante, vol. iv. 386. *Wells v. Price*, post, 398, and the note.

3 per cent. Consolidated Bank Annuities, 1600*l.* Reduced Annuities, and 616*l.* 2*s.* 11*d.* cash ; and in regard that the petitioner

[* 19] *Chassaing has been at considerable expense, exhausted his own private fortune, and contracted great part of his present embarrassments, in supporting his wife and children for several years, during which her fortune has been suffered to accumulate, and the accumulation composes more than is requisite for the payment of his debt, and his creditors have been kept out of their claims so long upon the idea, that the same had been provided for out of these trust funds, which have been assigned by both petitioners for the purpose, that it cannot be expected they will show him any farther indulgence, and as he has neither the present means nor a prospect of having means of satisfying such debts except out of her fortune, and his being sued and imprisoned will not only be injurious to the credit and interest, but destructive of the happiness and comfort of her and her children ; and as she has for several years had experience of his good conduct and affectionate attachment, and is particularly desirous, that a sufficient part should be appropriated for his debts, the petition therefore prayed accordingly.

The MASTER OF THE ROLLS, when the petition was opened, said, he ought not to forget what Lord Thurlow did upon the petition in *Like v. Beresford* (1) ; though he thought it a harsh thing in that case : but this was much worse.

Mr. *Graham*, Mr. *Richards*, and Mr. *Hart*, in support of the Petition. There are many circumstances distinguishing this case from that. There the Court was circumscribing the power of the husband for the benefit of the wife and children. They had separated ; and had different interests. What was to be given was to go immediately from the wife to creditors of the husband. In this case almost all the debts were incurred in necessary expenses for the maintenance of the wife and children. The order, if unfavorable to the petition, will recoil upon them. His imprisonment will not relieve his family. He has been for many years incurring meritorious debts, to maintain his wife in the situation in which he found her. In the common case of elopement with a ward of the Court, the interest of the fortune for the maintenance of the husband and wife is scarcely ever refused. Mr. and Mrs. Beresford were separated :

they did not agree ; and there was no prospect of their
[* 20] living together. The parties propose to *live together ; and have lived with great tenderness. By refusing this application the Court will throw him into a situation, in which the criminal law of the country would not place him. He has exhausted all his own property in the maintenance of his family, and is only desirous to be put in a way to support them by his industry. He has made atonement for his conduct as far as he can. All he asks is to the amount of 1700*l.* ; and the accumulation is above 2000*l.*

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I will

(1) *Ante*, vol. iii. 506.

read over all the proceedings ; and look again into *Like v. Beresford*. The only question is, whether any part of these debts shall be paid. I shall certainly take care that the husband shall have no part of it.

Nov. 14th. MASTER OF THE ROLLS. I have read all the papers ; and it is impossible for me to entertain a petition, praying, as this does, that the debts of this man shall be paid ; in that way giving him completely the fruits of his very improper conduct ; and I cannot by any means authorize in any degree such a proposal as he has thought fit to make. The utmost, that he could obtain (and I doubt, whether I could go so far) would be, that the settlement should be to her separate use for life, and after her death to her children, with a power to her to give him a part during his life. But as to paying his debts, incurred under these circumstances, after having carried her away, one of his scholars, and living with her in such a way, that his marriage with her would not have been near so great an offence, the attempt is in my opinion an insult to the Court. At present I shall only refer it back to the Master to receive other proposals ; for these are such as I shall by no means accede to. I wish the parties would take the Lord Chancellor's opinion.

See, *ante*, the note to *Stevens v. Savage*, 1 V. 154, and note 1 to *Stackpole v. Beaumont*, 3 V. 89.

PULLEN v. SMITH.

[* 21]

[1799, Nov. 20.]

ADMISSION of assets prevents the necessity of setting forth the accounts.

Admission, that there is standing in the names of the executors upon the trusts of the will a considerable sum in the 3 per cents., and offering an appropriation, was held sufficient to entitle the Plaintiff, a contingent legatee, (a) to move for that purpose ; and by consent the order was made, as upon admission of assets sufficient to satisfy the Plaintiff's demand, to transfer, &c., [p. 21.]

ROWLAND FULLER by his will gave to his niece Ann, wife of Edward Pullen, an annuity or yearly sum of 30*l.* for the term of her natural life, to be paid by equal half-yearly payments, for her sole and separate use, free from the debts, control, and engagements of any husband she then had or might hereafter have ; and he directed his trustees and executors by and out of his personal estate to purchase so much stock in the 3 per cent. Consolidated Bank Annuities as would produce an annual sum sufficient to answer and pay the said annuity, and to cause the same to be transferred into their own

(a) See 2 Williams, Executors, pt. 3, bk. 3, ch. 4, § 4, (2d Am. ed.) 1004 ; *Green v. Pigot*, 1 Bro. C. C. 103 ; Remarks of Buller, J. in *Hutcheson v. Hammond*, 3 Bro. C. C. 144, 145. On the subject of appropriation, see *Cooper v. Douglass*, 2 Bro. C. C. 231 ; *Attorney General v. Mannors*, 1 Price, 411 ; *Hill v. Atkinson*, 2 Meriv. 45 ; *Webber v. Webber*, 1 Sim. & Stu. 311-313.

names for that purpose ; and after the decease of the said annuitant he gave the principal sum, which should have been laid out for securing such annuity, to the eldest son of such annuitant, and, if there should not be a son, to the daughter or daughters in equal shares, if more than one ; and he directed the interest to be applied for maintenance.

The testator then, after specifically devising a freehold estate, gave and devised to Charles Smith and two other persons and their heirs all his messuages, lands, &c. at Heron Hill in Kent, and all other his real estates whatsoever and wheresoever, to hold to them and their heirs, upon trust to sell ; and he declared his will, that the net money to arise by sale of his real estates should be considered as part of his personal estate ; and he appointed the trustees his executors.

After the death of the testator the bill was filed on behalf of the only child of Ann Pullen, an infant, against the trustees and the parents of the Plaintiff, praying in the usual manner, that the trustees might either admit assets sufficient to purchase so much stock as would produce an annual income sufficient to answer the annuity, or that an account might be taken of the testator's personal estate, debts, &c. ; and if necessary an account of the rents and profits of his real estate received by the said Defendants ; and that the will might be established ; and the estate sold, with the necessary consequential directions.

[* 22] The executors by their answer stated, that there is now standing in their names upon the trusts of the will a very considerable sum in the 3 per cent. Consolidated Bank Annuities ; and the whole dividends and interest arising therefrom have always since the decease of the testator been half yearly paid and divided to and among the several persons entitled thereto under the said will with regularity, and, as the Defendants believe, to the satisfaction of Ann Pullen and her husband ; who have never requested any separate appropriation for such annuity ; but nevertheless the Defendants hereby consent to transfer 1000*l.* 3 per cents., part of the said stock, as a specific appropriation to secure such annuity and the legacy to the Plaintiff.

To this answer several exceptions were taken for not setting forth the accounts and answering particularly the several interrogatories. The answer was reported insufficient in the whole of the exceptions ; and an exception was taken to the Report.

Mr. *Alexander*, in support of the exception to the Master's Report. The whole of this bill is turned into exceptions. As to the foundation of them, it has always been understood, that the admission of assets makes it unnecessary for the executor to set out these accounts ; and this bill so understood it ; for the prayer is in the alternative. The answer consents to a specific appropriation to secure the annuity and legacy out of this fund ; and they might have moved the next day upon that, as an admission.

Mr. *W. Agar*, for the Report. When the Defendants offer to set apart a particular portion of the fund, it is very material, that the

Plaintiff should have that set apart free from the trusts of the will. It is not enough to appropriate a part of the property appearing upon the records of the Court to be liable to the debts. The invariable practice of the Court is, that the party shall admit assets, or set forth the account; and in this case it is very material that that practice should be adhered to. The real estate is made subject to the debts; and the executors are in trade.

LORD CHANCELLOR [LOUGHBOROUGH]. Does not your
argument go to this; that executors cannot pay a legacy [23]
without taking an account of the debts?

For the Plaintiff. If the Defendants had offered to sell part and pay us, that would have been different. If they pay any part of money out of their hands, it is not charged with the trusts.

LORD CHANCELLOR. You are anticipating what will be the wording of the order, when you move, that they may pay in the money. Suppose the order to run thus; that the executors, admitting assets in their hands sufficient to satisfy the Plaintiff's demand, shall transfer: will not that be sufficient? The Defendants would not object to that, if, instead of taking exceptions the Plaintiff had only made the motion, guarding it so.

The exceptions were over-ruled; and, the Counsel for the Defendants consenting, an order was made, as upon a motion, that the executors, admitting assets sufficient for payment of the annuity and legacy, may transfer 1000*l.* 3 per cent. Consolidated Bank Annuities into the name of the Accountant General to that account.

See, ante, the notes to *The Marquis of Donegal v. Stewart*, 4 V. 436, and note 1 to *Hovey v. Blakeman*, 4 V. 596. It should be observed that, by the bill now [1827] before Parliament, "for the improvement of the administration of justice in the Court of Chancery," it is proposed to declare that, where a suit is instituted by any person, having or claiming an interest under a will or other instrument, or by an executor or trustee acting under the same, the Court is at liberty, if in its discretion it shall think fit, to make a decree or order confined to the particular relief prayed by such bill, or the particular object for which the same shall have been filed, without making any decree for the general execution of the trusts of such will or instrument. And it is farther proposed to be enacted that, when any person shall claim to be entitled under any will or codicil to any interest in the personal estate of a deceased testator, if such claim is disputed by reason of any alleged doubt with respect to the construction or effect of such will or codicil, the person making such claim, or the person acting in the execution of the trust of such will or codicil, shall be at liberty to present a petition to the Court, praying such relief or such directions as the case may require, and the Court shall thereupon proceed to hear such petition in a summary way, and on hearing the same, determine and declare the true construction and effect of such will or codicil, so far as relates to such claim, and make such order thereupon, and as to the costs of such application, as shall be just; and such order shall be of the same force and effect as if the same had been made in a cause depending in the Court, relating to the same matter as such petition, and between the same parties who appeared upon the hearing of such petition, or had due notice of the same.

SERGEANT'S INN HALL.

MATHEWS v. WARNER.

(UPON A COMMISSION OF REVIEW.) (1)

[1799, Nov. 20.]

UPON a Commission of Review the sentences of the Court of Delegates and of the Prerogative Court, establishing a testamentary paper as the will, were reversed. (a)

THE Commission of Review was held, in consequence of the certificate of the Lord Chancellor in this case, reported, *ante*, Vol. IV. 186.

After the *Advocate General*, the *Solicitor General* [Sir William Grant], and Mr. *Richards*, had been heard in support of [* 24] the testamentary paper, dated * the 2d and 6th of October, 1785, the Commissioners of Review without hearing the Counsel on the other side reversed the sentence as well of the Court of Delegates as also of the Judge of the Prerogative Court of Canterbury appealed from to the said Court of Delegates; pronounced against the force and effect of the pretended last will and testament and codicil of William Mathews, the deceased in this cause, bearing date the 2d and 6th days of October, 1785; and that the said deceased is dead intestate; and directed the costs on both sides to be paid out of the estate of the said deceased.

SEE, *ante*, the notes to S. C. 4 V. 186.

CARY v. FADEN.

[1799, Nov. 21.]

THE Plaintiff published a book of roads of Great Britain comprising Patterson's book, to the copyright of which the Plaintiff was not entitled, with improvements and additions obtained by actual survey and otherwise. An injunction to restrain a publication of an edition of Patterson, comprising the Plaintiff's improvements and additions, was refused. (b)

A MOTION was made for an injunction to restrain the Defendant from printing and publishing a work under the title of "A new and

(1) The Commissioners who sat, were the Bishop of London; Lord Kenyon; Lord Chief Baron Macdonald; Sir William Scott, Judge of the Court of Admiralty; Rooke and Lawrence, Justices; Doctors Arnold and Robinson.

(a) See 1 Williams, Executors, pt. 1, bk. 2, ch. 2, § 1, (2d Am. ed.); 51, ib. § 4, p. 62.

(b) The difficulty in these cases is to distinguish what belongs to the exclusive labors of a single mind, from what are the common sources of the materials of the

accurate Description of all the direct Roads and principal Cross Roads in Great Britain."

The case made by the bill and the affidavit of the Plaintiff was, that the Post Master General in 1794, requiring a very extensive and minute survey of the different Roads in Great Britain, the surveyor and superintendent of the mail coaches engaged the Plaintiff for that purpose: who undertook it without any profit or satisfaction, except a license to use the survey for the purpose of publishing a more correct book of roads than any extant. The Post Master General granted the Plaintiff every assistance; and he sent circular letters to all the Post Masters in the kingdom for their corrections and remarks; in order that the best road might be described, and a correct account given of those inns, which furnished post horses, &c. In 1798 the Plaintiff having completed a very extensive and minute survey of all the great roads, both direct and cross, throughout England and Wales, with other particulars and heads of information, published a book of roads entitled "Cary's New Itinerary; or an accurate Delineation of the great Roads, both direct and cross, through England and Wales, with many of the principal Roads in Scotland;" which was duly entered at Stationer's Hall.

The bill charged, that the work of the Defendant was
 * not an original work, but either in the whole or part a [* 25]
 copy of the Plaintiff's work.

In opposition to the motion an affidavit of Francis Newbery, the proprietor of Patterson's Road Book, was produced; stating, that the work of the Plaintiff contains the whole or very nearly the whole of the said original work, published by the deponent, with some additions and improvements by the Plaintiff; but the general plan or design of the Plaintiff's work is not new or original, but is the same

knowledge, used by all. In the case of maps, two men with the same design, having equal skill and opportunity, may by their separate labors produce maps very similar, — one map may be almost a *fac simile* of the other, — but neither can complain of the other. Still it does not follow that one man may copy the map of another and claim it as his own. He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another. See 2 Story, Eq. Jur. § 940; *Gray v. Russell*, 1 Story, C. C. 11; *Eden on Injunct.* (2d Am. ed.) 328, 329. See *Campbell v. Scott*, 11 Simons, 31; *Carnan v. Bowles*, 2 Bro. C. C. (Am. ed. 1844,) 84, 85, and notes; *Lewis v. Fullerton*, 2 Beavan, 6; 2 Kent, (5th ed.) 382-384; *Wheaton v. Peters*, 8 Peters, 591; *Bramwell v. Halcomb*, 3 Mylne & Craig, 737. In this last case it was held, that the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work, which he has quoted, or introduced into his own book. It is not only quantity, but value, which is looked to. See also *Bell v. Whitehead*, the English Jurist, 1839, p. 14; *Sweet v. Shaw*, the English Jurist, 1839, p. 212. In *Saunders v. Smith*, 3 Mylne & Craig, 711, 728, 729, the same subject was much considered in reference to copyright in reports. So also in *Wheaton v. Peters*, *ubi supra*; *Hodges v. Welsh*, 2 Irish Eq. 266. It is piracy to collect together and reprint from the law reports all the cases on a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes. *Hodges v. Welsh*, *ubi supra*.

as the said original work published by the deponent; and the additions or improvements by the Plaintiff form but a very small part of the work; the remainder being copied in some instances page for page from the deponent's said book. The Plaintiff's publication was within twenty-eight years from the first publication of the deponent's said original work.

The *Solicitor General* [Sir William Grant] and Mr. *Richards* in support of the motion. In *Carnan v. Bowles* (1) both Lord Thurlow and Lord Kenyon thought a road-book entitled to the protection of the law. Lord Kenyon granted an injunction as to so much as appeared to be a copy. Lord Thurlow upon a subsequent occasion reversed that order; and dissolved the injunction generally; thinking the second work, though containing the same matter, original in itself. The Defendants have literally copied the Plaintiff's improvements; and complain only, that the Plaintiff's edition resembles Patterson's original work. That must be the case from the nature of the work. The Plaintiff has sworn, that his book has been formed in a very great part of it from actual admeasurement. It is not therefore a copy of any other book, but is original within the intent of Lord Thurlow's language. The Plaintiff has introduced a new method, and a great deal of new matter; whence he has a right to acquire copyright. The Defendants do not affect to say, their work is original: in many instances they have followed the very errors. Independent of the copyright arising from actual admeasurement the Plaintiff by his correspondence with the Post Masters has been enabled to publish a work wholly distinct from Patterson's.

The next question is, whether the Court will direct an [* 26] *inquiry. That is not necessary. It would have been proper, if the Defendants had put in issue, that their work is not a copy from the Plaintiff's: but he does not put that in issue. He does not deny, that in all the additional matter it is a copy.

The *Attorney General* [Sir John Mitford], for the Defendants. The whole plan of the work is Patterson's. The Plaintiff having pirated that work brings forward this complaint. There is no merit of invention, except in the plan.

LORD CHANCELLOR [LOUGHBOROUGH]. Upon my inspection they are very different works. Patterson's is the original work. Corrections, improvements, and alterations, have been made upon that from time to time. The Plaintiff has taken a different line; having had a survey made for the purpose; to which he is very well entitled. He has made a very good map; with which it is very pleasant to travel. I think it is fair, they should try their weight with the public. What right had the Plaintiff to the original work? If I was to do strict justice, I should order the Defendants to take out of their book all they have taken from the Plaintiff, and reciprocally the Plaintiff to take out of his all he has taken from Patterson. I

think, the Plaintiff may be contented, that a bill is not filed against him.

No order was made (1).

1. WHENEVER an action at the suit of the author would lie against a person pirating books, (*Lord Byron v. Johnson*, 2 Meriv. 29; *Hogg v. Kirby*, 8 Ves. 225; *Stockdale v. Omohay*, 5 Barn. & Cress. 177,) prints, or charts, (*Blackwell v. Harper*, Barnard, Cha. Rep. 120; *Wilkins v. Aikin*, 17 Ves. 425; *Harrison v. Hogg*, 2 Ves. Jun. 423; *Longman v. Winchester*, 16 Ves. 271,) or music, (*Platt v. Button*, 19 Ves. 447; *Clementi v. Walker*, 2 Barn. & Cress. 861,) a Court of Equity will grant an injunction, to restrain a fraud on the author's property: but where the character of the publication is such, that no damages could be recovered in respect thereof at Law, Equity will refuse to interpose. *Lawrence v. Smith*, Jacob's Rep. 472; *Walcot v. Walker*, 7 Ves. 2; *Southey v. Sherwood*, 2 Meriv. 440; *Lord and Lady Percival v. Phipps*, 2 Ves. & Bea. 26; *Gee v. Pritchard*, 2 Swanst. 415.

2. The collection of materials may establish a claim to copyright in a work, notwithstanding the subject may be obvious to all mankind; and an injunction will issue to stop the publication of a work which is a servile copy of a preceding one, with merely colorable alterations. *Matthewson v. Stockdale*, 12 Ves. 273, 276; *Butterworth v. Robinson*, 5 Ves. 709. Nor will it be permitted that one man should, under pretence of quotation, publish another's work, and thus defraud him of the fruit of his labors: *Wilkins v. Aikin*, 17 Ves. 424: for although an abstract or fair abridgment of a publication is allowable, (*Doddsley v. Kinnerley*, Ambl. 403; *Gyles v. Wilcox*, Barnard, Cha. Rep. 368; *Bell v. Walker and Debreth*, 1 Brown, 451; *Whittingham v. Wooler*, 2 Swanst. 431,) yet a colorable abstract will be restrained. *Butterworth v. Robinson*, 3 Ves. 709; *Carnan v. Bowles*, 1 Cox, 285; *Macklin v. Richardson*, Ambl. 696; *Gyles v. Wilcox*, 2 Atk. 142.

3. No property can be acquired in any article copied, in the same language, from a prior work: *Barfield v. Nicholson*, 2 Sim. & Stu. 1: *a fortiori*, no one who chooses to copy, and publish, a specification of patents, can thereby acquire a right to restrain another from copying the same; for these are common property: but a translation is as much entitled to protection as an original production. *Wyatt v. Bernard*, 3 Ves. & Bea. 78.

4. When a plaintiff has permitted repeated infringements of his copyright, for a great length of time, Equity will not interfere, (by injunction, at any rate, whether it may be proper to direct an account to be kept, or not,) before the right is determined at law: *Platt v. Button*, 19 Ves. 448; *Rundell v. Murray*, Jacob's Rep. 316.

5. Whether the act of publication abroad makes a work, at once, *publici juris*, may be very questionable; but there can be no doubt that, where an author prints and publishes *abroad only*, or where he does not take prompt measures to publish here, he cannot, after a reasonable time for his publishing here has elapsed, and after some other person, without any fraud, in the regular and fair course of trade, has published the work in this country, sustain an injunction against such person. *Clementi v. Walker*, 2 Barn. & Cress. 866, 870.

6. A parol assignment of the copyright of a work may not be sufficient to give the assignee the privileges conferred by the legislature upon the author. *Power v. Walker*, 3 Mau. & Sel. 9. But when a publisher has been induced by such an assignment to employ his capital and attention upon a work, withdrawing them from other matters in which they might have been more profitably employed, and when the author has acquiesced in seeing his parol assignment acted upon for a length of time, a Court of Equity, even if it acknowledged his strict right, would

(1) *Cary v. Longman*, 1 East, 358; *Southey v. Sherwood*, 2 Mer. 435; *post*, *Hogg v. Kirby*, vol. viii. 215; *Matthewson v. Stockdale*, xii. 270; *Longman v. Winchester*, xvi. 269; *Wilkin v. Aikin*, xvii. 422; *Ibid*. 342; *Platt v. Button*, xix. 447; *Coop*. 303, copyright in music; *Wyatt v. Barnard*, 3 Ves. & Bea. 77; *Whittingham v. Wooler*, 2 Swans. 428; *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Rundell v. Murray*, 1 Jac. 311. The cases of piracy under color of abridgment, *Butterworth v. Robinson*, *post*, 709, and the note. *Canham v. Jones*, 2 Ves. & Bea. 218, a claim of exclusive property upon a similar principle.

probably think his conduct entitled him to no summary relief by injunction, and would leave him to such remedy as he might have at law. *Rundell v. Murray*, Jacob's Rep. 316.

7. That the proprietor of a copyright must file separate bills against each book-seller taking copies of a spurious edition for sale, see *Dilly v. Doig*, 2 Ves. Jun. 487; and for the principle on which that rule is founded, see, *ante*, note 2 to *Harrison v. Hogg*, 2 V. 323.

8. In cases of alleged piracy of literary property, a reference is usually directed to the master; ——— *v. Leadbetter*, 4 Ves. 681; but, in order to save expense, the Court will sometimes compare the two works itself. *Whittingham v. Wooler*, 2 Swanst. 431.

9. This note, as to its earlier sections, is, for the greater part, extracted from 2 Hovenden on Frauds, 147, 149.

[* 27]

WHARTON v. MAY.

[1799, Nov. 7, 8, 11, 12, 15, 18, 22, 25.]

On the ground of fraud a general account was decreed; (a) and the securities to stand only for the balance, (b) though the vouchers had been destroyed by general consent.

Post obit bonds, though upon terms of gross inequality, established; such securities not being liable to impeachment on the ground of usury. (c)

THIS bill was filed under the following circumstances:

In 1788 John Wharton, Esq. being just of age, was possessed of a considerable estate, and entitled to considerable reversionary in-

(a) See 1 Story, Eq. Jur. § 523; *Barrow v. Rhineland*, 1 Johns. Ch. 550; Story, Eq. Pl. § 800 to 802; 1 Fonbl. Eq. b. 1, ch. 1, § 3, note (f).

Where there has been fraud a Court of Equity will open and examine accounts after any length of time, even though the person committing the fraud be dead. *Botifseur v. Weyman*, 1 M'Cord, Ch. 161.

A running account closed by a bond may be opened by a Court of Equity on the ground of fraud. *Gray v. Washington*, Cook, 321.

If in a bill in Equity to open a settled account, the facts alleged and proved show fraud actual or constructive, in the settlement, the plaintiff will be entitled to relief, notwithstanding the bill contains no direct averment of fraud. *Furnam v. Brooks*, 9 Pick. 212.

(b) Where a deed is only constructively fraudulent, Chancery will direct it to stand as a security for the sum really due. *Boyd v. Dunlap*, 1 Johns. Ch. 482; *Bernal v. Donegal*, 1 Bligh, N. S. 594; S. C. 3 Dow, 133; *Boynon v. Hubbard*, 7 Mass. 120; 1 Sugd. Vend. & Purch. (6 Am. ed.) ch. 6, § 1, art. 56, p. 333, [463]; *Gwynne v. Heaton*, 1 Bro. C. C. 11; 1 Story, Eq. Jur. § 344. It is otherwise with deeds void on the ground of clear fraud. *Sands v. Codriss*, on appeal, 4 Johns. 536; *Boyd v. Dunlap*, *ubi supra*.

(c) A *post-obit* bond is an agreement on the receipt of a certain sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person, from whom he has some expectation, if the obligor be then living. This contract is not considered a nullity; but it may be made on reasonable terms, in which the stipulated payment is no more than a just indemnity for the hazard. But whenever advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable bargain, on payment of the principal and interest. Per Parsons Ch. J. in *Boynon v. Hubbard*, 7 Mass. 112. See 1 Story, Eq. Jur. § 342; *For v. Wright*, 6 Madd. 111; *Hyde v. White*, 8 Sim. 524; *King v. Hamlet*, 2 Mylne & Keen, 474; Blydenburg on Usury, ch. 2, § 4, p. 37.

terests expectant upon the death of his mother Mrs. Hall Stevenson, and of his aunt, Mrs. Frances Farquharson; who was of the age of seventy-two, very infirm, and not in capacity to dispose of her property; he had also very great expectations from his great aunt Mrs. Margaret Wharton, then ninety years of age. From the year 1788 down to 1794 he had considerable money negotiations with Joshua Mendez Da Costa; in the course of which he executed several securities to Da Costa and Isaac Bernal. Mr. Wharton was first introduced to Da Costa by Edward May, a barrister; who, being asked by Wharton for a person to discount a bill of 1000*l.* upon a wine merchant, mentioned Da Costa; with whom he had previously had money transactions. In 1794 May, as the confidential friend of Mr. Wharton, came to a settlement with Bernal and Da Costa; who delivered up their securities: and Mr. Wharton soon afterwards executed other securities to May. The authority, under which May acted in the settlement with Bernal and Da Costa was the following letter:

“ *Dear May,*

Nerot's Hotel.

“ I will be much obliged to you, if you will take up from Bernal and Da Costa all the securities they hold of mine according to the plan we agreed upon, and I shall give you other securities for them — I am so much ashamed of these damnable transactions, that after having cancelled I shall thank you to burn them, that no vestige may remain — I remain very sincerely yours,

To Edward May, Esq.

“ JOHN WHARTON.

Surry-Street, Strand.

June 27th, 1794.”

The securities obtained from Mr. Wharton by May in this transaction were

Ten bonds, dated the 1st of July, 1794, from Mr. Wharton, to May for securing 2000*l.* each; one * of which bonds was afterwards converted into two bonds for 1000*l.* and 1012*l.* [* 28]

One bond of the same date from Wharton to May,

£20,000

4,140

£24,140

One bond and warrant of attorney, dated 3d November, 1794, from Wharton to May for securing 6000*l.* on the death of Mrs. Hall Stevenson, with interest at 3*l.* 10*s.* per cent. in the mean time.

One bond and warrant of attorney, dated 3d November, 1794, from Wharton to May for securing 6000*l.* and interest by instalments of 1000*l.* per annum.

The object of the bill filed by Mr. Wharton, was to impeach all these transactions, as the result of a fraudulent combination of the Defendants May, Bernal, and Da Costa, to impose upon the Plaintiff. For this purpose the bill prayed, that it may be declared, that the securities, given and executed by the Plaintiff to the Defendants

are to stand as securities for what is really due from the Plaintiff on a balance of all accounts; that an account may be taken of all moneys advanced by the Defendants Da Costa, Bernal, and May, respectively to the Plaintiff or on his account; an account of all moneys received by Defendants respectively from or on account of the Plaintiff; and that the balance may be ascertained, which the Plaintiff offers to pay: and an injunction to restrain the Defendants from proceeding at law, and from assigning the securities.

The bill was twice amended, and a supplemental bill filed; and each of the Defendants put in six answers. The consideration for the twelve bonds obtained by May for the sum of 24,140*l.* according to the representation in May's first answer was,

19,212 <i>l.</i> 12 <i>s.</i> 10 <i>d.</i>	{	Paid or secured by May to Bernal on taking up the Plaintiff's securities to that amount. Borrowed by May principally from Bernal for the use and at the request of the Plaintiff, as per schedule.
5,873 <i>l.</i> 14 <i>s.</i> 2 <i>d.</i>		
<hr/>		
25,086 <i>l.</i> 7 <i>s.</i> 0 <i>d.</i>		

The schedule to May's answers set forth an account current between him and the Plaintiff, commencing in July, 1793; [* 29] in * which among various payments by May on account of the Plaintiff were some in July and August 1793 to Bernal and Da Costa.

The sum of 19,212*l.* 12*s.* 10*d.* consisted of the following securities of the Plaintiff's and interest due upon them:

A bond for	.	.	.	.	.	£6740	0	0
Interest	.	.	.	.	.	359	3	1
A bond for	.	.	.	.	.	1700	0	0
Interest	.	.	.	.	.	90	11	9
A bond for	.	.	.	.	.	3243	0	0
Interest	.	.	.	.	.	159	14	9
A bond for	.	.	.	.	.	1200	0	0
Interest	.	.	.	.	.	16	9	6
A note for	.	.	.	.	.	2630	0	0
Interest	.	.	.	.	.	147	2	9
A note for	.	.	.	.	.	2900	0	0
Interest	.	.	.	.	.	26	11	0

£19,212 12 10

The sum of 6740*l.* was the balance due on a bond of the Plaintiff's for 9740*l.* dated the 7th of June, 1792, after deducting 3000*l.*, which according to Bernal's latter answers formed the consideration of the *post obit* bond after mentioned on the life of Mrs. Farquharson for 6000*l.*

The sum of 9740*l.* accrued due to Bernal as follows:

By agreement in October, 1789, for a *post obit* bond for 2000*l.* in consideration of 1000*l.* if the Plaintiff should survive Mrs. Wharton.

By agreement 22d of October, 1789, upon the same terms.

1789.	Nov. 9th.	<i>Post obit</i> bond by Plaintiff under the above agreements	£4000	0	0
1790.	Feb. 20th.	A similar bond in consideration of 720 <i>l</i> .	1440	0	0
	July 28th.	A similar bond in consideration of 500 <i>l</i> .	1000	0	0
	Sept. 25th.	A similar bond in consideration of 1050 <i>l</i> .	2100	0	0
	April 1st.	A similar bond in consideration of 600 <i>l</i> .	1200	0	0
			£9740	0	0

Mrs. Wharton died on the 8th of September, 1791, in [*30] the ninety-fifth year of her age. She was born on the 24th of April, 1697. On the 7th of June, 1792, the Plaintiff paid to Bernal all interest from Mrs. Wharton's death to that day; and executed the bond for 9740*l*. payable in twelve months.

As to the bond for 1700*l*. dated the 7th of June, 1792, the statement by the answers of Bernal and Da Costa was, that it was taken by Da Costa in Bernal's name for a debt, which, Da Costa told Bernal, the Plaintiff owed him, but he thought it best to take it in Bernal's name: and Da Costa informed Bernal, that he had delivered up four of Plaintiff's promissory notes to him as the consideration for it.

The bond for 3243*l*. dated the 6th of July, 1793, was a *post obit* bond for payment of 6486*l*. on the death of General Lambton, in case he should live beyond the 25th of March, 1794, and the Plaintiff should survive him: but in case of his death before that day the money advanced only was to be returned with interest. General Lambton, who was of a very advanced age, died upon the 22d of March, 1794; consequently only the single sum became due. The consideration for this bond was stated to be a note of the Plaintiff's for 3243*l*. payable to Da Costa or order, and for which Bernal swears he paid Da Costa the full amount in cash, notes, or drafts on a banker. Da Costa was partner with Bernal for 500*l*., part of this bond.

The bond for 1200*l*. dated the 1st of April, 1791, was also a *post obit* bond on the life of General Lambton, in consideration of 600*l*. of which 400*l*. was Bernal's and 200*l*. Da Costa's.

The note for 2630*l*. was a promissory note by the Plaintiff, dated the 18th May, 1793, remitted by the Plaintiff to Da Costa, in exchange for a note to the same amount, as stated by Da Costa in his letters, but which, as the Plaintiff contends, was altered by Da Costa from 1630*l*. to 2630*l*.

The note of the Plaintiff's for 2900*l*. bore date the 25th of April, 1794. Bernal by his answer stated, as the consideration, that he allowed the full amount as cash in account with May, as per schedule.

*The two bonds for 6000*l*. each, dated the 3d of November, 1794, were given in consideration of two other bonds of the Plaintiff, which May assured the Plaintiff he had dis- [*31]

charged or taken up from Bernal ; one dated the 30th of May, 1793, for 6000*l.* payable at the death of Mrs. Hall Stevenson, in case the Plaintiff should survive her ; and the other, dated the 6th of July, 1793, for 6000*l.* payable at the death of Mrs. Farquharson, in case the Plaintiff should survive her. The consideration paid by May to Bernal for these two bonds was stated by May to have been his own note for 7500*l.* with an obligation to secure the same farther by his bond and warrant of attorney ; which he afterwards executed.

The consideration received by the Plaintiff for those bonds, according to Bernal's answer, was, as to the bond depending on the life of Mrs. Stevenson, 3000*l.*, stated to have been paid by Da Costa to the Plaintiff ; and, as to the bond depending on the life of Mrs. Farquharson, 3000*l.*, written off by Bernal on the 7th of June, 1793, from the bond for 9740*l.* dated the 7th of June, 1792, which became payable on the 7th of June, 1793. Da Costa was partner with Bernal for 500*l.* of the consideration for the last-mentioned *post obit* bond. Mrs. Farquharson died in February, 1797.

The debt claimed from the Plaintiff by Da Costa amounted to 7900*l.* and interest from the 10th of July, 1794 ; for which sum the Plaintiff had given his bond of that date to Da Costa ; payable by instalments, and May gave his bond and warrant of attorney as a collateral security. Da Costa stated, that all accounts between him and the Plaintiff were finally settled upon the 29th of April, 1794 ; and the balance of that account due to Da Costa, namely, 7227*l.* was the consideration of a bond for 6000*l.* and a note for 1228*l.*, taken by Da Costa from the Plaintiff on the 1st of May following ; and that bond and note being delivered up by Da Costa, together with a note of the Plaintiff's for 600*l.* in the hands of one Parker, which Da Costa undertook to pay, formed the consideration for that bond of 7900*l.*

Bernal by his answers stated, that on the 1st of July, 1794, the Plaintiff was indebted to him on bonds and other securities, 19,212*l.*

He admits, he never paid the Plaintiff personally any sum
[* 32] of money * whatsoever, but always through the medium of

Da Costa ; and swears all the above transactions passed between him and Da Costa, who acted as agent of the Plaintiff but not of him (Bernal) ; that he settled and paid all the money to Da Costa as the Plaintiff's agent ; that all the bonds and securities were prepared by Da Costa, and he was a subscribing witness to them all. Bernal stated, that he became acquainted with May in January or February, 1791 ; and had afterwards very considerable money transactions with him ; and there was generally a very considerable balance due from May to him ; that in the account between him and May were several promissory notes of the Plaintiff's ; that he (Bernal) kept a regular entry of his accounts with May ; that he kept no account of the notes of the Plaintiff's, which he discounted for Da Costa ; that on the 1st of July, 1794, May owed him (Bernal) 10,400*l.* on his own private account.

Da Costa by his answers stated, that he first became acquainted

with the Plaintiff at May's house in 1788 or 1789; that the Plaintiff wanting money, and May representing to him (Da Costa) the Plaintiff's large expectations, he at the instance of the Plaintiff and May at that time and various times afterwards had very considerable money negotiations with the Plaintiff; but can give no account of the particulars; but the same were finally settled on the 29th of April, 1794, at 7227*l.*; and the Plaintiff then either took away or destroyed all the vouchers; that such accounts and vouchers having been delivered up to the Plaintiff or destroyed by him or at his request, he (Da Costa) cannot set forth the several sums of money or the amount thereof received by him from or on account of the Plaintiff; that such balance of 7227*l.*, together with the Plaintiff's note in the hands of Parker formed the whole consideration for his bond for 7900*l.*; that he cannot set forth any particulars, either as to the persons, to whom, or the times and places, when or where, and the persons, in whose presence, the several consideration moneys for his securities were paid; that in the course of such money negotiations with the Plaintiff he (Da Costa) occasionally, and when he had not money of his own for the purpose, got the Plaintiff's bills discounted by Bernal; and that in all such cases he always gave or remitted to the Plaintiff all the money he so received from Bernal; which were the full value for the same, but he cannot set forth any particulars, all the vouchers * having been destroyed or delivered up to the Plaintiff; that he hath not, nor ever had any book or books, wherein any accounts or entries relating to any transactions or dealings with the Plaintiff are entered; that he cannot set forth any account of the moneys paid by him and Bernal to the Plaintiff, or the times when, or purposes, for which, or occasions, on which, the same were advanced, or of the moneys received by him and Bernal of Plaintiff or on his account, except as before stated. He admits, he received several sums of money from or on account of the Plaintiff or for his use, and for insuring his life, but cannot set forth the particulars or amount, except as before stated; but such insurance was upon the life of the Plaintiff singly, not against that of Mrs. Wharton. He admits, he did not pay any money for such insurance; but at the Plaintiff's request, lest it should make his affairs too much known, he took the risk upon himself. He admits, he purchased about 5000*l.* India stock for Plaintiff to enable him to vote at the India house: but the Plaintiff not having the money forthcoming, the same could not be completed; and Plaintiff thereby lost some money: but to what amount Defendant does not recollect. He admits, he acted as agent for the Plaintiff; that he caused the bonds or most of them to be prepared, and attested the execution. [* 33]

May by his answers stated himself throughout to have been the confidential friend of the Plaintiff: he admitted, that he introduced Da Costa to the Plaintiff as a money broker in 1788; and that there had been previous money transactions between him and Da Costa; that he knew the Plaintiff's situation and expectancies; that he was

desirous of concealing his borrowing money from his relations; that he was paying exorbitant interest for money; and he (May) recommended him to put an end to it. He admits, that all the securities given by the Plaintiff to him were given upon the faith, that he had advanced and paid, or given security for, the full amount thereof, and upon the faith and understanding, that he had used his best endeavors to obtain the same upon terms as advantageous to the Plaintiff as he could; and he declares, that he had not in the slightest manner benefited himself, nor had ever intended so to do; and that on being repaid with interest the money he had paid for the Plaintiff, he was ready to deliver up all the Plaintiff's securities.

The first answer of May, after disclaiming any particular [*34] knowledge of Bernal and Da Costa, and stating in strong terms his ignorance of their dealings with the Plaintiff, previous to June 1794, states the manner, in which he first became acquainted with, and interfered in, their transactions thus. In or about June 1794, one Williams, who was and is a stranger to him, called on him to consult him in his professional character respecting certain actions for usury against Da Costa and Bernal, and which related to the Plaintiff; and some few days after such interview with Williams the Defendant May being then confined to his bed, and the Plaintiff calling to see him, he (May) for the first time he had ever held any conversation with Plaintiff or any other person or persons, except Williams at the time aforesaid, on any transaction, that had passed between the Plaintiff and Da Costa and Bernal, mentioned to the Plaintiff the circumstances, which Williams had stated to him; and asked the Plaintiff, if it was possible, he had been so very thoughtless; and from motives of friendship, wishing to render Plaintiff all the assistance in his power, and with a view of extricating him from the embarrassment he was then involved in respecting said transactions, requested Plaintiff not to conceal the real state of his affairs from him; when Plaintiff confessed to him, that the most part of what he had heard was true; that he thereupon recommended to Plaintiff, if possible, to settle his affairs, and put an end to the exorbitant interest, which he was paying; and that after some conversation Plaintiff requested him to interfere in such transactions on his behalf, and attempt to settle the same; to which May replied, that if he found upon inquiry the information he had received to be well grounded, he would immediately assist him.

In his second and third answers he repeats this account; adding, that Williams informed him, he had in his possession an account of the bills and notes of the Plaintiff's on which he could prove usury against Da Costa and Bernal, and which he then produced to him. He stated, that the Plaintiff knew, Williams had commenced the actions; and that he (May) at first thought, Plaintiff was the director thereof, until Williams gave him a copy of the declaration or information to read; when perceiving a variety of other transactions between Da Costa and other persons, he was then satisfied, Plaintiff was not likely to have knowledge of such private affairs

or to have any thing to do with such action: nevertheless he believes, Plaintiff was very anxious, that such action should be carried on; and endeavored to collect all the papers; and even consulted Mr. Walton, the Barrister, himself thereon.

Having by his first four answers represented, that he paid and secured to Bernal the sum of 19,212*l.* 12*s.* 10*d.* on taking up the Plaintiff's securities to that amount, being unable to impeach any of them, which account was confirmed by the first answers of Bernal and Da Costa, by a subsequent answer he states, that he did by the directions of Da Costa and Bernal and at their request pay to Williams 8000*l.* out of the money, which he (May) was to pay to Da Costa and Bernal for Plaintiff's securities, as a composition for an action actually commenced against Da Costa and Bernal for usury touching some of their transactions with Plaintiff and other persons. He gives a description of the person of Williams, but, who he is, or where he resides, or what is become of him, he says, he is unable to set forth. He says, he afterwards saw Williams come out of a coffee-house, and speak to a Mr. Cunningham (1); and in the end of August or beginning of September, being a short time after he had paid Williams the 8000*l.* he saw Williams and Mr. Cunningham in a chaise near Stamford, going towards the north; and Williams then told him, he came from Northumberland or Westmoreland; and he (May) has never seen or heard of him since. He states, that the said 8000*l.* was actually paid by him in cash or bank notes by different sums to Williams in July, August and September, 1794, at May's then house in Surrey Street; but in whose presence the same was paid he is unable to set forth from his belief or otherwise: he not now recollecting the same, and having had no reason to induce him to remember. He believes, Da Costa and Bernal, or one of them, and Williams had conversations together respecting Plaintiff's securities, and the charge of usury, and the compromise with Williams, but not with him (May); he having no concern with such compromise farther than by paying the 8000*l.* At the time of the delivery of Plaintiff's securities to him by Da Costa and Bernal there was a tacit admission by all parties of usury respecting the charge brought by Williams. He believes, in a conversation between him and Bernal on the subject of the *qui tam* actions, he admitted, he had been consulted as Counsel by Williams respecting said usurious transactions; *and he believes he [*36] did say, the penalties would be severe, if Williams substantiated the facts; and admits, he told Bernal, from the papers laid before him he thought Da Costa would be in a dangerous situation, and that he did advise Bernal to get rid of his name in said actions by paying a sum of money to Williams; and that he afterwards informed Bernal, he believed Da Costa had taken illegal interest and more commission than he ought from the Plaintiff and

(1) The gentleman here mentioned died a few days before the answer was put in.

divers other persons, whose names had been mentioned in the papers laid before him. He says, at the request of the Plaintiff and Williams, and in order to serve the Plaintiff, he afterwards told Bernal and Da Costa, that he should be able to compromise said actions for 8000*l.* or 9000*l.* and that he offered to settle with Williams, and to take the Plaintiff's securities, which the Plaintiff had given to Bernal, in payment thereof. He admits, he did frequently advise Bernal to compromise said actions; and believes he might have assured Bernal, he spoke to him as his friend and for his security, and to serve him; but says, his chief view in the business was to assist and serve the Plaintiff. He admits, he wrote the letter to Bernal in the bill mentioned; but says, such letter was written with the Plaintiff's privity and at his express request, and in his presence, and with the consent of Williams.

That letter, which the bill charged to have been written in June 1794, was in the following words:

"MY DEAR SIR,

"I have been all day with Mr. Wharton, and have brought him into the terms I left you yesterday. Have you seen Mendes; and does he consent? I do on my honor as a friend recommend the settlement; and I do it, knowing it best for you. I will call on you on Sunday, and will arrange the business. I hope Mr. Ditcher has paid his bill. Let me know.

"I am, dear Sir, sincerely,

"Your much obliged humble servant,
"ED. MAY."

The Defendant farther admits, it was agreed between him and Da Costa, with the consent of the Plaintiff and Williams, that Da Costa, should pay 4000*l.* to Williams out of the Plaintiff's securities by way of compromising said actions; and it was [*37] agreed *between him and Bernal, with the knowledge of the Plaintiff and Williams, that Bernal should pay Williams the farther sum of 4000*l.* out of said securities; and thereupon it was agreed between Bernal, Da Costa, and May, with the consent of the Plaintiff, that Bernal should give up to May the Plaintiff's securities to the amount of 19,212*l.* 12*s.* 10*d.*; and that May should give security to Bernal for 11,212*l.* 12*s.* 10*d.* and should pay 8000*l.* the residue of the said sum to Williams; and he (May) hath accordingly paid the same to Williams, and also paid 11,212*l.* 12*s.* 10*d.* to Bernal by his bond, dated the 3d of July, 1794. He denies that the *qui tam* writs were issued by his directions; or that the attorney, who issued them, was employed by him: nor does he know, who was the attorney, who was first employed in said business. Soon after he was informed such actions were commenced he found the Plaintiff directed every thing relative thereto, and paid the expenses; and Plaintiff, or Williams with his approbation, as Plaintiff informed him (May), employed Mr. Edwards to conduct the same. He says, he never did a single act in the whole affair

without the consent of the Plaintiff; and he informed the Plaintiff of the compromise with Williams; to which the Plaintiff assented. He first endeavored to effect the compromise with Williams at the Plaintiff's request; who was anxious to keep the whole affair secret, as soon as he had given up the idea of proceeding in the actions; and the Plaintiff bound him (May) to a solemn promise never to divulge his name; which he (May) most rigidly observed.

The Defendants Da Costa and Bernal by their subsequent answers, and depositions (1), being examined for May, stated, that they had been served with *qui tam* writs at the suit of Williams; and, though conscious of their innocence, they assented through May to the compromise, by giving up each 4000*l.* of the Plaintiff's securities: Da Costa assigning his reason, that having determined to give up business he wished to avoid having a charge of that sort brought against him; and Bernal alleging May's persuasions under the profession and appearance of friendship and a desire to serve him; suggesting his apprehension, that Da Costa had taken illegal *interest and more commission than he ought from the. [*38] Plaintiff; and that he (Bernal) would in consequence be affected. Bernal gave the same account as May of the purchase of the two *post obit* bonds for 7500*l.* in September, 1794; May upon receiving the bonds giving his note for that sum, and promising within a month to execute bonds, which he did accordingly.

Bernal farther stated, that on the 1st of July, 1794, he delivered the Plaintiff's securities to the amount of 19,212*l.* 12*s.* 10*d.* to May; who gave him a receipt, promising either, to return the securities on demand, or within a month to give Bernal his bonds and a mortgage for the amount: but about three weeks afterwards it was agreed, that May should pay to one Mr. Williams 8000*l.* out of the amount of said securities, and should give security to Bernal for the residue only, namely, 11,212*l.* 12*s.* 10*d.* May accordingly gave Bernal his bond and warrant of attorney, and also a mortgage for securing that sum; and after the 1st of July, 1794, and before the 18th of September, 1795, he paid Bernal at different times the whole of that sum and also the whole of said sum of 7500*l.* and the farther sum of 637*l.* 12*s.* 6*d.* for interest; which sums make together 19,350*l.* 5*s.* 4*d.* and the 8000*l.* paid to Williams made 27,350*l.* 5*s.* 4*d.* being the amount of the securities delivered by Bernal to May and of the 7500*l.* the purchase-money of the said two *post obits*, and the said interest money; and Bernal thereupon delivered up to May his bonds and warrants and mortgage; and Bernal says, he has not now any demand whatever upon the Plaintiff or on May on account of any money advanced by him (Bernal) to the Plaintiff.

Da Costa stated, that he had received of May two sums amount-

(1) On the proposal to read Bernal's evidence an objection was taken on the part of the Plaintiff. The Lord Chancellor declared, it could not be evidence; as it involved the question in the cause; for, if the transaction was fair, and May was to pay Bernal, the Plaintiff must pay May. His Lordship however expressing a wish to hear the deposition, it was read *de bene esse*.

ing together, as near as he can recollect, to about 1500*l.* for two instalments on account of his debt; and May with certain other persons as his sureties have lately executed another bond for the remainder; which now remains due to him.

Edwards, the attorney, who was employed in the actions, being upon this account of the transaction with Williams examined by the Plaintiff, deposed, that he does not know the Plaintiff, but that he knows May; that on the 6th May, 1794, the Defendant May and one Thomas Williams (both of whom until that time were entire [* 39] *strangers to the deponent) called at his house; and May in the presence and hearing of Williams, then told the deponent, that his (May's) name was Blake, and that he was recommended to the deponent by a gentleman of the Temple, whom he named; and May in the presence and hearing of Williams then gave directions to the deponent as an attorney to commence four several actions at law in the name of the said Thomas Williams, two against Da Costa and two against Bernal, upon the Statute of Usury; and May assigning as a reason for directing two actions against each of them, that each had committed offences against the Statute in Middlesex and in London; and immediately after May had given such instructions the deponent observed, that it would be necessary to inform him of the residence and occupation in life of Williams; whereupon they or one of them told him, Williams had lived at Bristol, but was come to London for the purpose of bringing said actions; and was then residing at the Golden Cross Inn; and the deponent understanding, that Williams had not then any settled place of residence at Bristol, advised him to take a regular, settled, lodging, so that the deponent might give the same as his settled place of abode, in case he should be called upon by Order of Court for that purpose, and that he might know where to send to him; and in consequence thereof Williams soon afterwards took a lodging in the Adelphi. In consequence of such directions the deponent did on the 6th of May, 1794, sue out two bills of Middlesex in the name of Williams, one against Da Costa, the other against Bernal; and on the 10th he sued out two other bills of Middlesex. The writs were served on Da Costa on the 19th of May and on Bernal on the 21st. The deponent was served with a Judge's summons to state the residence and occupation of Williams; which he accordingly did. On the 9th of July, 1794, he took out and served upon the attorneys of the Defendants rules for time to declare; and on the 10th Williams called upon him; and told him, he was not to proceed any farther in said actions by reason, that such actions had been settled or compromised to the satisfaction of his friend; and the deponent soon afterwards understood and believes, said actions were settled or compromised by means of Da Costa and Bernal delivering up to May some securities of the Plaintiff's to the amount of 8000*l.* The deponent never saw May on the subject of the actions save on the said 6th of May; and though May gave such directions to the deponent, he looked on Williams as his employer

in the actions, and accordingly made Williams debtor to him in his day-book with respect to the costs. On the said 6th of May the deponent received 5*l.* 5*s.* towards payment as attorney in said actions; which sum to the best of his recollection and belief he so received of May; and he then made the following entry in his day-book :

"6th May, 1794, *Thomas Williams q. t.* Received of Mr. Blake and him on account, 5*l.* 5*s.*"

On the 16th of May the deponent received the farther sum of 6*l.* 6*s.* of Williams towards farther payment of his bill : and he then made the following entry :

"16th May, 1794, *Williams q. t. v. Bernal and Da Costa.* Received of Mr. Williams to give retainers to Counsel, and gave receipt for the same, and for the former five guineas, 6*l.* 6*s.*"

The said two sums of 5*l.* 5*s.* and 6*l.* 6*s.* are the only sums the Deponent ever received toward his demand as attorney in said actions; and 4*l.* 3*s.* still remains due to him.

The original writs were produced by Edwards.

From the proceedings upon the Commission of bankruptcy against May in 1798, which was afterwards superseded, as having been sued out by fraud, it appeared, that Bernal proved a debt of about 28,000*l.* under the Commission; and May upon his examination stated, that he was indebted to Bernal at the time of his bankruptcy about that sum. Bernal and his partner De Silva were the assignees under that Commission.

The original note, for which the note for 2630*l.* was sent by the Plaintiff to Da Costa was produced, cancelled. Upon inspection of the note, and from the letters between the Plaintiff and Da Costa, it was contended for the Plaintiff to have been originally for 1630*l.* only; and the calculation of interest on the face of the note appeared to be for that sum. Da Costa was indicted for a * fraud upon the Plaintiff with respect to this note and was [*41] acquitted (1).

The securities held by Da Costa were impeached by the production of the following receipt signed by him, and dated "Norfolk Street, 29th April, 1794," which was the same date as that of the settlement of accounts set up by him as the principal consideration for his securities :

"Received of John Wharton, Esq. two thousand one hundred

(1) The indictment was preferred by May. In the deposition of Da Costa's solicitor it was attempted to give a color to this, as an acquittal upon the merits: but Mr. Raine, who had been one of the Counsel for the prosecution, stated, that in consequence of a variance in one of the counts they were obliged to resort to the general count. May was the principal witness, loaded with much suspicion, particularly upon that transaction, being a collateral security. Wharton, not being considered competent, was not produced. The Court (Mr. Mainwaring) stated to the jury, that, though very considerable suspicion hung upon the transaction, the man must be tried by the evidence. The jury however paused a considerable time, before they reluctantly found the verdict. Da Costa applied for a copy of the indictment; which was refused.

pounds by note payable at twelve months with interest ; which is for balance and in full for commissions to this day."

These were the prominent features of this cause. A large proportion of the argument was occupied by a minute investigation of the answers and schedules ; upon which, the Plaintiff contended, the fraud and combination of the Defendants manifestly appeared. The transactions with respect to the two *post obit* bonds upon the lives of Mrs. Stevenson and Mrs. Farquharson in particular were canvassed, as well with regard to the terms, upon which they were purchased from Bernal by May, compared with those he afterwards obtained from the Plaintiff in consideration of that purchase, as upon the original consideration paid by Bernal ; who, though by his first answer he admitted, that the Plaintiff on the 7th of June, 1793, paid him the interest upon the bond for 9740*l.* and 3000*l.* in part payment of that bond, which was also expressly stated in a letter from him to the Plaintiff, by his subsequent answer represented the 3000*l.* written off that bond to have been the consideration of the bond of the 6th of July. In opposition to this on the part of the Plaintiff was produced Da Costa's receipt, dated the 2d of July, 1793, for 3000*l.* as the consideration for Mrs. Farquharson's *post obit* ; and it was con-

tended upon these circumstances, that there was the strongest [* 42] reason to suspect, * the Plaintiff had not the credit to which he was entitled, by 3000*l.* ; in which the Lord Chancellor concurred ; observing, that the sum of 3000*l.* stated to have been written off the bond for 9740*l.* upon the 7th of June, could not possibly be the consideration of the bond upon the life of Mrs. Farquharson ; which had no existence till the 6th of July. On the part of Bernal it was attempted to reconcile it by supposing an inaccuracy in the answer, and that by the letter he did not allude to a payment in cash, but by an agreement for the *post obit*, afterwards carried into execution.

It was farther contended for the Plaintiff, that, one of Da Costa's receipts being now admitted to be false, the other, which was also produced, dated the 27th May, 1793, for 3000*l.* as the consideration of Mrs. Stevenson's *post obit*, might be presumed to be false too.

The Lord CHANCELLOR observed during the argument, that it appeared by May's own statement, that 5900*l.* of the payments stated to have been paid by him for the Plaintiff was paid after the bill was filed.

The argument upon the general principles applicable to this case were in substance as follows.

The Attorney General [Sir John Mitford], Mr. Piggott, Mr. Steele, Mr. Romilly, and Mr. Raine, for the Plaintiff. The Plaintiff cannot be stated as a man of weak understanding, or a minor. But it is the constant practice of Courts of Equity to consider persons in this situation as under their protection in a certain degree, though they may have attained that age, when they are no longer to be considered as wards of the Court, or otherwise under the protection of the law. The reason is not only grounds of public policy, but that

persons in such a situation do not deal upon equal terms ; for concealment from their friends and relations, and all those, who are likely to give the best advice, is essentially necessary in such transactions. The consequence is, such a person is not in the same situation as a young man precisely of the same age, but wholly independent of relations. Even as to intailed property he is to a certain degree in a situation, that is apt to mislead him extremely. The hope of obtaining it and the uncertainty give an *advantage to money-brokers in dealing with persons in [*43] such a situation.

This case contains all the different heads of fraud, upon which in each of the cases of this kind the Court has thought fit to interpose. Whether the manner of dealing, or the situation of the Plaintiff, or the subject-matter of the contract, or the relation between the parties, be considered, in all these different views this case will be found to be composed of all of these ingredients, each of which separately the Court has always considered a sufficient ground for interposing. The three Defendants May, Bernal, and Da Costa, endeavor to distinguish themselves from each other. That is impossible upon the whole case ; and they must now be taken, when all the circumstances are considered, as one. Bernal states himself to be a merchant ; that he has carried on business in that character in London many years, and in that character has been concerned in money transactions. Though he is a merchant, he states, that of these transactions, of which the bill seeks an account, though he entered into them in the character of a merchant, he has no books of any description, in which there is or can be traced any entry of any one transaction between him and the Plaintiff. When those transactions are considered, that there must have been entries in Bernal's books must be evident. They are bill transactions. Bills were lodged with him by the agent of the Plaintiff, his name upon them ; all payable at future times. There must have been bill books, bankers' book, entries of drafts, calculations of interest, in all the ways, in which such transactions are entered in the books of Mr. Bernal, a merchant. But however incredible and improbable it is, if, because he says, he never made any entry of any of these transactions, that must be believed, the whole consequence is, that if he was the most upright merchant in London, it must be his misfortune, that he is in that situation ; for this and every Court of Justice has a right to expect, that a person describing himself to be in that situation shall have entries of such transactions. It is incident to his situation. It is part of his obligation as a merchant ; and the Court can have no faith in his transactions upon such a statement, that, though he is a merchant, and keeps books with other people, he has no entry of these transactions. I desire no better evidence of fraud. If the cause stood alone upon that admission, it is quite impossible he could *sustain those pretended accounts. It is not sufficient to state, that he had settled accounts, and delivered up vouchers. Vouchers perform the office of verifying accounts [*44]

and entries in mechanics' books: but they are not accounts or entries: and though it is perfectly true, that a merchant may have delivered up vouchers, that is no excuse for not having at any time made any entry of these enormous money transactions. If he had delivered up vouchers, it does not follow, that he was not obliged to produce the books. Can better evidence of fraud be offered? If he did enter these transactions, he knows, the production of the books would specifically fix the fraud upon him: and if he did not, there can be but one reason; that he was practising the fraud with which he is charged. If any case could exist of omitting entries, least of all ought he to have done so in this case; for he was not dealing with a merchant, who might have books to supply the want of entries in his books or to check them: but he was dealing with a person, from whom the Court would not expect books, with a person, who, he knew, could have no check. He says he never in these six years saw the Plaintiff but once at a coffee-house: the whole of his transactions with the Plaintiff were carried on through Da Costa. Was it fit, that Bernal, knowing he was transacting with an agent of the Plaintiff, not personally with him, was to furnish him with no means of checking his agent? Was he to permit Da Costa to become the sharer and partner, as he was in many instances, with him, and to make no entry? Was he to become a trustee for Da Costa, Wharton's agent, and to be able to give no account, but generally to state, that whenever he had paper from Wharton, he gave value to Da Costa his agent? Da Costa states himself to be a very old money broker in London, and to have been employed in this way. He also has no books. He could hardly be ignorant, that Bernal kept no books: then it was the more incumbent on him. Therefore the Plaintiff can get no account either from his own agent, to whom he paid a commission, or from the person with whom that agent dealt. The first transaction between the Plaintiff and Bernal was in 1789. Mrs. Wharton then was above ninety-two: the Plaintiff twenty-two at most. There was no other contingency, upon which that obligation could fail, but the Plaintiff's not surviving Mrs. Wharton. Consider the nature of that contingency. It was an event, against which an insurance could have been effected for the smallest sum. In Lord

[*45] * *Chesterfield v. Janssen* (1) Lord Hardwicke observed, that whether the contingency is inserted, or not, it is the same thing. It is the risk the creditor always necessarily runs: the fund for payment depending upon the debtor's surviving. If that was a reasonable bargain in 1789, what was it in 1791? She died in September 1791. The last bond was given only five months before her death; and all these bonds were upon the same terms,

(1) 2 Ves. 125; 1 Atk. 301. In addition to the authorities referred to in that case and upon this argument see 1 Ch. Ca. 276; *Hill v. Caillovel*, 1 Ves. 122; *Nicols v. Gould*, *Hylton v. Hylton*, 2 Ves. 422, 549; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Heathcote v. Paignon*, and *Fox v. Mackreth*, 2 Bro. C. C. 167, 400; 1 Fonb. Tr. Eq. 134, 135, 141.

for double the sum received. Upon the same ground it might be contended to be reasonable, if she had been *in extremis*.

The bonds were due six months after Mrs. Wharton's death. Bernal then calls upon the Plaintiff: but so far from expecting to be paid he advances other money, and takes other securities. All, that can be alleged for him, is, that after her death the Plaintiff took up those *post obits*, and in July 1792 gave an absolute bond for 9740*l*. payable at the end of one year from that time. Before that new bond became due, Bernal states, that he had supplied the Plaintiff with 3000*l*. more, for which he takes a *post obit* upon the death of Mrs. Stevenson. These two dates, viz. the transaction of that *post obit*, and the date of that bond substituted for the former *post obits*, are material to show the Plaintiff's situation, and the impossibility, that Bernal could expect payment; for only seven days before the bond for 9740*l*. was due he had furnished the Plaintiff with 3000*l*. and taken a *post obit*. Can he then state himself to know, the Plaintiff was in a situation to pay that bond of 9700*l*.; that he was a free agent; that that bond did not become due for a year, and he was at liberty to pay or contest it, as he thought proper? It did not rest there. Plaintiff was not in a condition to pay the bond for 9700*l*. the week after; and when that bond became due Bernal makes a new contract, and writes off 3000*l*. from the bond of 9700*l*., and takes another *post obit* bond for 6000*l*. more upon the death of Mrs. Farquharson; which is the subsequent transaction, upon which May dealt with Bernal. These transactions show the same state of distress, that gave rise to these unfortunate means of raising money, and made the Plaintiff the prey of rapacity such as the Court sees in this cause.

* This debt being accumulated, these parties have recourse [*46] to a stratagem, upon which, if one could forget the indignation such a scene excites, one should pity the folly and weakness of supposing, that such a contemptible artifice could shut out an inquiry. Bernal's securities might be questioned; and so might Da Costa's. It was difficult to screen them: but if they could hand over their securities to another person, and could produce a written authority from the Plaintiff, desiring that third person to interfere, it was intended, that person should stand in this Court as a purchaser, and there should be a universal destruction of all vouchers, and Bernal then should tell the Court he has no demand. May states, that he interposed not only in his professional character, but he adds the *stimulus* of private friendship, to Bernal, according to his statement upon honor in his letter, to the Plaintiff, according to his statement upon oath. What is the effect of this as to the Plaintiff? He is in just the same situation. The effect is only, that Bernal and Da Costa pay 4000*l*. each to Williams. May must have been a very monied man, if this was so; if he could pay at that time 8000*l*. to Williams, of whom he gives no account; and he had so much money, and so many bank notes, that he can give no account, how he paid that sum, though so recently afterwards called upon to state, how he paid that sum of

8000*l.* to a person, of whom he knows nothing, who stumbled upon him by accident among the many practising barristers in this town. He denies, that he had any thing to do with the actions, that he knew the attorney employed, in his first answers. At length he admits, Edwards was the attorney; which enabled the Plaintiff to have recourse to him, and to develope this extraordinary proceeding, and completely disprove the answers.

In these transactions, May in his answer says, he intended benefit to the Plaintiff. There is as little benefit to him as in the other transactions, where May purchased the *post obits*, in which he increases the debt above 4000*l.* more than he had contracted to pay. If he had acted in the character of a fair and honest adviser, he would not have suffered the Plaintiff to pay a farthing of those demands without investigation. If the reduction of the 8000*l.* upon the settlement with Bernal had been obtained for Plaintiff's benefit, May would have had something to have stated. But it is impossi-

ble for him to state any thing but that he placed Plaintiff [*47] *in precisely the same situation; only putting a cover over these transactions. Your Lordship has the best evidence of the nature of their transactions. May then was advising his friend Mr. Wharton to come to this settlement, where he had such complete evidence of the imposition practised upon him. The Plaintiff had not to bring actions for usury. The advice ought to have been "file a bill; and have an account taken." But May states, that he gave this advice; the consequence of which is making Plaintiff debtor to him in the same sum, from the impression, that he could not get out of it.

In the transaction of the two *post obit* bonds purchased for 7500*l.* the benefit, which May professes to give Plaintiff, is shown by his taking a bond for 6000*l.* payable by instalments, and another bond for 6000*l.* payable upon the death of Mrs. H. Stevenson, with interest at 3 1-2 per cent. in the mean time. He makes the debt absolute instead of contingent. The gain upon that transaction is 4500*l.* He says, he had those bonds valued. Suppose, that was so, then he makes a profit of nearly 3000*l.* upon it: which however is not the true estimation.

As to Da Costa, he stands upon the settlement of accounts with the Plaintiff upon the 29th April, 1794: Wharton alone settling the account with Da Costa, unattended, unassisted by any person, by any man of business; and Da Costa claims the benefit of that settlement, as if he had pleaded it! The settled account remains. If it was properly settled, there would be two parts. The vouchers, which verify it, may be delivered up; but where is this account; and where are Da Costa's books, containing the entries, from which it was made out? Can such a settlement stand? Da Costa, the agent of Wharton, in all his money transactions, in all his transactions with Bernal preparing the securities, and a sharer in some of those transactions? Is that to preclude him from giving an account to his principal, and to enable him to claim securities for the benefit of himself, and of him alone? But one voucher remains, that is ut-

terly inconsistent with that account: that is the receipt from Da Costa dated on that very day, 29th April, 1794, for 2100*l.* in full for balance to that day and commissions. That important paper ascertains two facts: 1st, that Da Costa received not only interest upon these money transactions, discounting bills, * &c. [*48] but also a commission. It is, because it is not convenient to give an account of those commissions, that Da Costa's answers are framed as they are. He also admits, that he charged Plaintiff with insurance, but that he put that in his pocket, taking the risk upon himself. Besides, that paper ascertains, that that sum of 2100*l.* was upon that day the balance of that settlement, if the Plaintiff could be bound by it. It is remarkable, that among Bernal's securities obligations appear, for which Bernal does not pretend that he paid any consideration, but that they were taken in his name for the benefit of Da Costa, who was the agent of Wharton, upon his telling him, that he had given up notes of Wharton's as the consideration. He states no reason for this transaction. It is plain therefore, that all these Defendants are combining to get as many securities as they can from this young man, and to make the transactions inexplicable by confounding the securities, passing them from hand to hand, and multiplying them, so as to make investigation very difficult. Add to this the situation of Wharton, just of age, one of those young men, to protect whom against depredations of this sort is always the object of this Court and part of the public policy of this country, and will be so as long as it will be an object to take persons of consideration out of the hands of those who feed extravagance for a time at the price of ruin.

Two cases have come into discussion not a great while ago. The first is *Vaughan v. Lloyd*, before Lord Thurlow (1); who was of opinion, that a variety of deeds and settled accounts obtained from the Plaintiff should not be permitted to stand, but that Defendant should be put to prove the whole demand. Plaintiff had considerable property, but involved, and subject as to part of it to a life interest, which made his income considerably short of the annual amount of the estate he possessed; and he was a man living in the country, not much in the habits of business, and rather a weak man. He was involved with Lloyd to a considerable amount. The sums paid by Lloyd for him in the original transaction were paid to relieve him from incumbrances partly by mortgage, partly by debts upon bond, judgment, &c. upon which executions were taken out. The Defendant who was an attorney at Oswestry, undertook to assist him. He made advances for the use of the Plaintiff, unquestionably to a considerable amount. Mr. *Powel, [*49] his father-in-law, was a man of some property, and had made some advances. Lloyd took upon himself that part of the property of Powel, which had been advanced by his means to Vaughan,

(1) In Chancery, 11th and 14th of May, 1781. *Watt v. Grove*, 2 Sch. & Lef. 492.

and then he farther assisted him, till he got security to the amount of 33,000*l.* The bill charged fraudulent accounts, general releases, improperly obtained, and prayed a general account; and that the securities should stand only for the balance. The Defendant put in four answers; stating a mortgage for 20,900*l.* in 1769. The consideration was several sums of money advanced from time to time. He stated several accounts settled from time to time upon the footing of that mortgage transaction, and interest calculated upon it. He had received part of the rents and accounted for them; and he insisted upon the benefit of these settled accounts. Upon the evidence it appeared, that several sums of money were charged improperly upon Plaintiff, and that he had not credit for other sums, and the accounts therefore were impeached considerably; and the Defendant standing in the situation of agent to the Plaintiff affecting to relieve him, and having increased his difficulties, Lord Thurlow was clearly of opinion, the account and securities could not stand. It was insisted, there should be a decree to surcharge and falsify. That was difficult from the nature of the case; but Lord Thurlow was of opinion, the transaction was so far impeached, that that was not the relief he ought to give. He relied upon *Piddock v. Brown* (1); where it is stated, that it was decreed by the Lord Chancellor, that upon producing a bond or mortgage this *prima facie* is good evidence of a debt; but that wherever there are manifest signs of fraud in the obligee, &c. in such case he ought to be put to the proof of actual payment; and though he may happen thereby to lose some part of the money really due to him for want of being able to make sufficient proof, this is but a just punishment of him for the fraud, of which he plainly appears to have been guilty, and will be a proper discouragement to others from committing the like (2).

Lord Thurlow said, this was the case of *Lloyd*. He produced a mortgage and bonds for the subsequent balances. If there was nothing to impeach them, *prima facie* they were good evidence of the debt: but fraud was proved upon them; that the [* 50] sums, * for which he took securities, were not due; and then he was brought within *Piddock v. Brown*; for when a man is proved guilty of fraud in a transaction, I have a right to say, that receipt or security shall not operate against the party, because to a certain extent it is clearly fraudulent; therefore the party guilty of the fraud shall be compelled to prove what he has advanced and the real consideration: it being clear he did not advance the whole. The result was that instead of 33,000*l.* the greatest part of the debt was wiped off. Several sums, which he pretended to have paid, were not paid; and he received vast sums for timber. There is reason to believe the Defendant lost money by it. He unfortunately had said, as these Defendants say, that all vouchers were delivered up; and he probably submitted to lose the money

(1) 3 P. W. 288.

(2) The Attorney General said, this agreed with Lord Talbot's note in his possession.

rather than produce the vouchers. He suffered in consequence of his having taken an unfair advantage ; and the Court proceeded upon the idea, that having taken that he should not make use of the securities (1).

The other case is *Lewis v. Morgan* (2). What the Court there says of the accounts being unintelligible applies strongly to the accounts in this case, as far as they go ; for as to a great deal there is no account at all. This Plaintiff had delivered himself over to May and Da Costa. They managed him as they pleased, and made him execute any instruments they required ; and Da Costa has made him execute instruments prepared by himself, and in some of which he had the sole interest, in others an interest with Bernal.

Upon all these grounds, the relation May and Da Costa stood in to the Plaintiff, the knowledge of Bernal, not only of the Plaintiff's expectations and situation, but that he was dealing with an avowed agent his own friend, with whom he was dealing in all his mercantile life, without more detail of the circumstances, upon each of these grounds, the Plaintiff has a clear title to relief : but upon all of them, this is a case, in comparison with which every other case is slight : the features of fraud are so pregnant, the *com- [*51] bination and conspiracy are so marked, that it is impossible it can escape the attention of the Court, that no case can be found, in which there has been such various and complicated fraud as in this. The Court seeing, that effect would be given to these contrivances, if the Court does not give the relief we desire, namely, that none of these securities shall stand as proof of debt, will adopt Lord Talbot's rule. It would be monstrous to consider, these securities as proof of debt. The Court will expect, that the Defendants shall give an account of the considerations paid for these securities, and shall not shelter themselves by contriving to give up their vouchers. If the Defendants have put themselves into any difficulty by the destruction of those securities, they are difficulties of their own raising, produced by their own fraud ; and they ought to be the sufferers. The Plaintiff is therefore entitled to the relief prayed. As to any act of confirmation, all that has been done under equal fraud and deception. Your Lordship will find, that down to the time of filing the bill and long after the same fraud was practised. Therefore nothing done, before the bill was filed by Plaintiff, can possibly give any different effect to the transaction, than if done the day afterwards.

Mr. Mansfield, and Mr. Fonblanque, for the Defendant May ; the Solicitor General [Sir William Grant], Mr. Richards and Mr. Sutton, for Da Costa ; Mr. Graham, and Mr. Hart, for Bernal. There is no

(1) The decree directed an account of all dealings and transactions between the Plaintiff and the Defendant ; the parties to be examined upon interrogatories ; and to produce upon oath all books, papers, &c. ; and it was ordered, that the mortgage in the pleadings mentioned do stand as a security for what shall be found due to the Defendant, upon the balance of the account.

(2) 3 Anstr. 769.

case even charging Defendants as conspirators, where the answer of one has been read against the others (a). Whether in a charge against three what one says shall affect the others must depend upon the proof of their connection. But there never was a case, where such evidence was used; where the evidence of what one Defendant says is to affect another, to show, that they were connected together. These securities were given, when Mr. Wharton was at least of the age of twenty-eight; when he was in possession of a large fortune, after Mrs. Wharton's death, besides his paternal estate, and when there is no doubt at all introduced into the cause, that all the evidences and vouchers were at Wharton's desire destroyed. I do not dispute, that this Court always shows attention to expectants; that is, to young men having no fortune, but having expectations from relations and other persons; but I deny, that your Lordship has before you an expectant in the sense this Court considers that word.

He had been married some years; and was at least twenty-seven. If a man at *that time of life is not of age sufficient to bind himself by bonds, the transactions of the world must be very much changed from what they have been hitherto. It is true, he had some additional expectations. His mother probably had some jointure; and something also was to fall to him from his aunt Mrs. Farquharson. That does not make a man an expectant in the sense this Court takes that word. All that was driven away in *Lord Chesterfield v. Janssen* by the consideration, that Mr. Spencer, though in expectation of a very large fortune,

(a) It seems to be a very well established general principle, that the answer of one defendant cannot be read in evidence against a co-defendant. *Judd v. Seaver*, 8 Paige, 548; *Hayward v. Carroll*, 4 Har. & Johns. 518; *Singleton v. Gayle*, 8 Porter, 271; *Thomasson v. Tucker*, 2 Blackf. 172; *Moseley v. Armstrong*, 3 Monro, 389; *Webb v. Pell*, 3 Paige, 368; *Collier v. Chapman*, 2 Stew. 163; *Mitchell v. Nash*, 1 Cooke, 240; *Davis v. Harrison*, 2 J. J. Marsh. 191; *Graham v. Sublett*, 6. J. J. Marsh. 45; *M'Kim v. Thompson*, 1 Bland, 160; *Cahwell v. Boyer*, 8 Gill & Johns. 136; *Dexter v. Arnold*, 3 Sumner, 152; *Felch v. Hooper*, 20 Maine, 159. Upon a bill in Equity by one partner against his co-partners for an account, the answer of one of the defendants will not be evidence to charge another. *Chapin v. Coleman*, 11 Pick. 331. But if it should appear that the defendants, as constituting a partnership among themselves, of the one part, were in partnership with the plaintiff, of the other part, the answer of one of the defendants would be evidence to charge the others. *Ib.* See also *Judd v. Seaver*, 8 Paige, 548; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Winchester v. Jackson*, 3 Hayw. 310. The answer of one defendant is not evidence against the other defendants, though prior to the filing of the answer the former may have transferred to the latter all his interest in the subject matter of the controversy. *Jones v. Hardesty*, 10 Gill & Johns. 404. See also *Haworth v. Bostock*, 4 Younge & Coll. 1; *Lewis v. Owen*, 1 Ired. Eq. 290; *Hoare v. Johnstone*, 2 Keen, 553; *Osborne v. U. S. Bank*, 9 Wheat. 738. But the answer of a defendant, which is responsive to the bill, is admissible as evidence in favor of a co-defendant, more especially where such co-defendant, being the depository of a chattel claimed by the plaintiff, defends himself under the title of the other defendant. *Mills v. Gore*, 20 Pick. 28. The deposition of a party in Chancery read without objection, is evidence for his co-defendant. *Fletcher v. Wier*, 7 Dana, 354. See *Wolley v. Brownhill*, 13 Price, 500; *S. C.* 1 McClel. 317.

If a defendant in his argument relies on the answer of his co-defendant, he thereby makes it evidence against himself. *Chase v. Manhardt*, 1 Bland, 336.

was himself in possession of a very considerable fortune. The only circumstance distinguishing that case from this is, that the Duchess of Marlborough was not ninety years of age. All the Judges there, and there never were more able, said, admitting, that the bargain was unconscionable originally, it was impossible to give relief upon the simple ground, that he might have made a better bargain. Wharton neither was very young, nor to be considered an expectant, but of full age, perfectly competent to act for himself, to enter into engagements, to judge of their propriety, and he was also in possession of a very large fortune. He had had many transactions with Bernal and Da Costa, with the former, as it appears, through the medium of Da Costa. It is positively denied by the answer, and there is not the least proof, that the letter from the Plaintiff, upon which these transactions arose, was dictated by May, and that it was not spontaneous from the Plaintiff, who might very well be ashamed of these transactions. May's interference was out of friendship to the Plaintiff, and a desire to serve him. It is asked, how he was served, if he is to pay all the same money to May. The answer is, the Plaintiff was pressed by these persons for money, perpetually urged and pressed by them; and if he did not comply, they were exacting from him more *post obits*, more engagements; and he wanted to put an end to all the temptations to extravagance, which his connection with these people held out to him; and he thought, he should be much better off and more at ease, when the securities were in May's hands, and he could avoid any farther connection with men, of whose dealings he thought he had reason to complain, and of which he was ashamed. It is asked, why May did not endeavor to impeach their securities. He says, he should have been very glad to do so; but he consulted with Mr. Walton in whom the Plaintiff had confidence; and he gave his opinion, that nothing could be done; there being no evidence to impeach the securities; not that May himself declined to impeach [* 53] them. Plaintiff knew this was true. He went with May to Walton's chambers; and he might have examined Walton, if he did not know it was true. Was it for May to engage in any suit to impeach the securities contrary to the advice of the person, to whom the Plaintiff resorted for legal advice? If he could not impeach them, nothing remained but to take them up. There is no ground therefore to impeach him upon that head.

In *Piddock v. Brown* the bill was to be relieved against a security executed for no consideration; the Plaintiff himself so weak a man, that he was not to be examined but by the Master himself; and your Lordship is to follow that in such a case as this; Wharton neither a young nor a weak man, fully knowing what he did, perfectly aware of it, having in his possession all the securities, which were delivered up by Bernal. There is no similitude between the cases. As little resemblance is there to the other cases mentioned. *Vaughan v. Lloyd* was the case of an attorney, who had had full possession of the Plaintiff, a man of fortune, perfectly unacquainted with business,

making mortgages, turning interest into principal, till he was perfectly devoured. There were glaring instances of advantage taken by the Defendant, a man of business. His accounts were very irregular. He could not make out any money due, and upon the face of the account produced by the Defendant the miscalculation was evident. *Lewis v. Morgan* is a case of the same sort. The Defendant, an attorney, had conducted himself in an extraordinary manner. There were bills of costs to an enormous amount. The Court went upon the principle your Lordship very wisely laid down in *Newman v. Payne* (1). But these cases do not apply to this. Wharton was not in the power of May. The pressure of his necessities was considerably lessened by the death of Mrs. Wharton. As to the transaction of June 1792, when the consolidated bond was taken, as it could not be impeached for usury (2), so neither could it be affected on the ground of extortion; for it was confirmatory. It took place nine months after the other securities were due; the party having had full time to turn round. The Plaintiff [* 54] did then confirm those *transactions, which in 1794 he called upon May to arrange; having in the interval never breathed any thing against them. This shows, with what deliberation this transaction confirmed in 1792 was afterwards again confirmed in 1794. But if these transactions were impeachable in Equity, though not at law, yet a man in the Plaintiff's situation in life, a Member of Parliament, must have paid some regard to honor. May's advice was to pay the debt, though perhaps contracted by extortion, yet obligatory to a certain degree.

Suppose this can be considered a case of expectancy, the transaction was confirmed. *Lord Chesterfield v. Janssen* brings out the strongest principle, that can be stated upon the effect of confirmation. All the learning and diligence of the Bar at that time were employed. Lord Hardwicke with every disposition to beat down the practice of *post obits*, stating them to be *vitia temporis*, found the confirmation too strong. *Post obits* certainly are not to be encouraged. The Court will undoubtedly lay hold of any opportunity to repress that species of dealing. But, circumscribed within certain rules, those transactions will always take place. The morality of the Royal Exchange is different from that of Westminster Hall; and men of the fairest character will engage in them. But however improvident the contract may be, however the party may be induced to it by the pressure of distress, if, after that is removed, he comes forward and does that, which some men may from honor, some from the regard of the opinion of society, he shall be bound. If ever there was an instance, in which great authority applied itself to repress the practice, and that attempt failed by the strength of the doctrine of confirmation, it is that case. Nothing can induce

(1) *Ante*, vol. ii. 199.

(2) The Lord Chancellor early in the argument observed, that *Post obits* could not be impeached on the ground of usury. *Curling v. Marquis Townshend*, *post*, vol. xix. 628.

your Lordship to lose sight of that authority, unless they can show in this case, as was attempted in that, that it was a continuance of the same fraud. Is this Plaintiff a person of that weak understanding, that he was likely to be surprised, inattentive to the concerns of life, and the interests attached to his situation? No. I will try him by his own correspondence. A more careful attention is hardly to be found in any man with regard to the practice of looking into his own affairs from time to time. As Lord Mansfield has stated of the policy of the law, I may say of that of this Court.

"It is a shield and not a *sword." It is not for a man [* 55] scrutinizing his affairs in this way, to come to this Court, and say, "Shield me;" confessing, that his eyes were open; and fully aware, that the policy of this Court would protect him; for he throws it out as a threat. As the charge rises high, the proof abates in proportion. Upon a charge, not of common fraud, but of the rankest perfidy, it may be expected, that some evidence to justify such a charge should find its way to your Lordship. All but Edwards's evidence has been supplied by the supposed contradictions. Of the contradiction between the answers of the several Defendants, the Plaintiff cannot avail himself. Of the contradictions in the answers of each Defendant he may; but not unless the contradictory passages are so specifically pointed out and separated as to allow of a correct judgment. The consequence of the decree is not interposing on behalf of a man of weak understanding, but of one, who appears to have looked forward in all his dealings to this auspicious moment to relieve himself; and not under common circumstances, but possessing himself of all the vouchers, and calling upon your Lordship, having the vouchers in his possession, avowing by his bill, that he has burnt the evidence of the Defendants, to send them to substantiate in the absence of evidence, that which can only be substantiated by evidence. Lord Hardwicke thought the loss of vouchers, the destruction and the having given up vouchers, a material circumstance. It is said, in many cases, it might have been otherwise, if the vouchers had been given up. Here they are avowedly destroyed. It is said to be by the confederacy of May: but how is that made out? The least, that is to be expected, from a Plaintiff coming to set aside a security of this sort, is, that if he does not prove himself imposed upon in every instance, in which he has dealt with the party, yet he shall specify some particular instances, and prove them, in order to set aside the securities, open the account completely, and throw upon the adverse party the entire burthen of making out the demand. Even to obtain permission to surcharge and falsify there must be a foundation laid by charging specific errors, and proving some of them actually to exist. In not one of the securities between Da Costa and the Plaintiff are errors specifically pointed out. He contents himself with the mere general allegation, that the full value was not advanced; not stating, that the security was so much, and the money advanced so much. The very question in such a case is, Whether he shall be put

to give any account of his advances; he is entitled to set up and rest upon his bond as a sufficient voucher of the justice of his debt, until they lay a ground for impeaching it, and call upon him to support that bond by evidence of his advances. Till then he is not bound to prove, that he advanced a shilling. As to the composition of the actions, men of the greatest character and the most conscious innocence have bought off prosecutions for offences of a very high nature; with regard to which they would be very unwilling to appear at the Bar of a Court of Justice. That is not the course of proceeding of a firm man, nor what he would be advised to adopt; but these terrors operate upon men's minds; and therefore it is not to be imputed to the Defendants, that they gave way to that apprehension. We have seen the effect of such an apprehension upon a very honorable man, who was attacked for usury in penalties to the amount of 150,000*l*. Though conscious of his innocence he was apprehensive: he did not know what might be the effect of false swearing; and it went so far, that the person, who supported the actions, being upon a cross-examination confuted and detected, went out of Court and put an end to his existence.

As to the charge, that the Defendants did not keep books, that might be a reason for their acquiescing in objections made to their accounts, that they are not so fully proved as they might be, and that cannot be supplied by their books. But it has never in cases, where it was much more obligatory, been carried to the extent now pressed. They neglected to keep books to their own injury merely. They did not stand in the confidential situation of trustees or agents to the Plaintiff, that obliged them to keep his accounts. In *Lord Hardwicke v. Vernon* (1) not long ago before your Lordship, we for the Plaintiff attempted to affect Mr. De Laet in that way. He was bound to keep Lord Hardwicke's accounts, and had kept no accounts. He was therefore reduced to the necessity of furnishing the account from scraps of paper and from his memory, and to make out the best account he could. We contended, that ought to have been of no avail as a settled account: but your Lordship thought, that, even so circumstanced, though his omission was very culpable, an agreement having been made, that an accountant should make out the best account he could, it was too much that he should have no credit for the sums paid. In *Lewis v. Morgan* the Court expressly state, that without the offer to give back the vouchers, they would not have opened the account; and as to those

[* 57] * items, the vouchers for which were destroyed, they refused to open the account. So in a case before Lord Hardwicke, *Townsend v. Lowfield* (2), containing many suspicious circumstances of fraud: the witness was dead, through whom the transaction had gone, and the money passed. The death was an

(1) *Ante*, vol. iv. 411.

(2) 3 Atk. 536; 1 Ves. 35.

accident not depending upon the party: but Lord Hardwicke said, he could not totally set aside the securities, and referred to a case in the House of Lords to the same effect. It is infinitely stronger, where it is the act of the party acknowledged by him, that actually precludes us from proving the demand in a case, in which in many instances it is clear the full sum was advanced, and in all according to the Plaintiff's admission a considerable sum must have been advanced. It would be an easy way of destroying every security to raise suspicions upon the transaction and give a security inducing the party to give up the vouchers. After such a decision no party would, as Sir W. Lewis did, offer to give back the vouchers.

LORD CHANCELLOR [LOUGHBOROUGH]. I will state to you the impression upon my mind at present; and leave it to the Plaintiff's Counsel to consider, whether they can carry the decree farther. I think it impossible to impeach Bernal's original transactions with Wharton as to the *post obits*. The settlement of those transactions is a confirmation full as strong as that in the case mentioned. I think, as at present advised, it is impossible, whatever the decree may be against May, that he could have any equity over against Bernal. The inclination therefore of my opinion at present is to let the securities stand for the 11,212*l.* 12*s* 10*d.*, making May account to Wharton for the 8000*l.*

As between May and Wharton there is no account settled. The accounts are of such a nature: the false accounts given, the falsification of his own account by the production here, make it perfectly just to decree a general account, charging May with the 8000*l.*

I hold the same idea as to Da Costa; for in making up that bond for 7900*l.* I cannot conceive that may not be unravelled, or that it is a true account. He states a settlement upon the 29th of April, and that the balance was 7227*l.* The Plaintiff produces * a receipt for 2100*l.* the balance upon a settlement of ac- [* 58] counts to that day. It is also true, that two days afterwards he takes a bond for 6000*l.* and a note for 1228*l.*; which with the note for 600*l.* in Parker's hands are the basis of the bond for 7900*l.* upon the second transaction. But when I come to look into Bernal's account of the several sums taken in his name for the benefit of Da Costa, I find, how very near they are the exact amount of the sum stated by Da Costa as the balance upon the 29th of April. There is the 1700*l.* with 120*l.* interest; 500*l.* with some interest, I do not know exactly what; the 200*l.*; the suspicious article of the 2630*l.* These sums altogether make 5150*l.*; and adding the 2100*l.* they come so very near the sum, that it impresses my mind, that the account was settled by taking a security for those other sums, which were covered by the securities in the name of Bernal, and that Wharton is doubly charged. The consequence would be to give relief so far to Wharton as to the 11,212*l.* 12*s*. 10*d.*

The Attorney General [Sir John Mitford] then observing upon the difference between this case and *Lord Chesterfield v. Janssen*, where there was no doubt, that the money had been advanced, said,

he could convince the Court, that all the money was not advanced ; and there was the greatest reason to doubt, whether the Plaintiff ever received the money, which it was imputed to him, that he did receive, and whether Bernal actually paid those considerations even to the extent he represents.

The Lord CHANCELLOR said, he was very open to argument upon it: if that was shown, it would carry it quite out of the case ; adding, that in throwing out the present state of his opinion he went upon the presumption, that the considerations for all these *post obit* bonds were paid, either to Wharton, or to Da Costa as agent of Wharton ; and as to Bernal it was no affair of his what passed between them as to that money.

The *Attorney General* in the reply contrasted this case with *Lord Chesterfield v. Janssen* ; in which there was no question, that the money was fairly advanced, and Sir Theodore Janssen [* 59] doubted the *legality of the transaction, and communicated his doubts to Mr. Spencer. The *Attorney General* also referred to Lord Thurlow's opinion on confirmation in *Crowe v. Ballard* (1).

The remainder of the reply was particularly directed to impeaching Bernal's account of the considerations he had paid for his securities, and to show, that Bernal having in several instances had notice, that Da Costa was deceiving the Plaintiff, and particularly from the circumstance of his taking the bond for 1700*l.* as for money advanced by him, though by his answer he confessed it was to cover a debt to Da Costa, had no right to consider Da Costa as the Plaintiff's agent. On the part of Bernal it was again attempted to account for the payment of the 3000*l.* for which, it was alleged, the Plaintiff had not credit upon the transactions of May, June, and July, 1793. The Lord Chancellor said, it was not very material, how it was paid ; for he should not decide upon that point ; but leave it open to him to make what he could of it before the Master.

LORD CHANCELLOR [LOUGHBOROUGH]. I shall very shortly state the principal circumstances, that lead to the decree I am about to make. It is a long time, since I have been acquainted either by my own experience or from the Reports and Books with a case of so singular and complicated fraud, or more powerfully calling upon the Court to make those persons, who state themselves as actors in that fraud, account for their transactions in a strict and regular manner.

The Plaintiff came of age in 1788. He was then possessed of a considerable estate and a considerable certain reversion upon the death of Mrs. Farquharson. She was entitled to a moiety of a third of the Wharton estate. He was one of her co-heirs : and she was not in a capacity to dispose of her property. That therefore, it is clear, as well as the reversion in his own estate upon the death of his mother, was certain. He had also very large expectations indeed from Mrs. Wharton, his grand-aunt ;

(1) 3 Bro. C. C. 117 ; *ante*, vol. i. 215 ; see the note, 221.

who was entitled to two thirds of the Wharton estate. He was her natural heir. Her character is perfectly well known. She had gone through a very long life with great frugality; and was very likely to be disgusted by any extravagance of her nephew. It was prudent in him, as long as she lived, to have a reserve, and to borrow privately. The first transaction, which gave rise to this suit, was in 1788. He had a singular enough security; a bill for 1000*l.* upon Mr. Lascelles. If that had been a common bill, there would have been great difficulty to have got that discounted. For some reason, not at all explained, he applies to his friend Mr. May, for a proper person to discount that bill; and May recommends Da Costa. In the first transaction, the subject of this suit, which began about Autumn, 1789, he applies to Da Costa, who has been employed in all the business afterwards as the broker, to raise for him 1000*l.* upon a *post obit* payable upon the death of Mrs. Wharton. He appears to have been pressing for the money, and to have received it all at Newmarket, in October, 1789; the terms two for one. I say little upon the gross inequality of it. With regard to these bargains, they are always unequal. Another sum of 1000*l.* was obtained upon the like terms; and these two sums were united in one bond for 4000*l.*; and I take it these two sums were all paid to him. In 1790, we find three more sums, in all to the amount of 2270*l.* I do not state the small sums separately. They were following pretty rapidly, upon the same terms, *post obits*, payable upon the death of Mrs. Wharton.

The next transaction was in 1791. Upon the same day there are two *post obits* for 600*l.* each, supposed to be advanced, payable, the one upon the death of Mrs. Wharton, the other upon the death of General Lambton. He executed in one day to Bernal these two bonds for 1200*l.* Mrs. Wharton dies in the September following, September, 1791. Upon her death at the end of six months, the amount of all her *post obits*, in the whole 9740*l.* would become due upon the face of the securities. Wharton came into possession of a very large sum of ready money upon her death. In June following a bond was taken, dated the 7th of June, 1792, for the whole sum of 9740*l.*; a plain, common bond, payable in a year; and at the same time, which is a remarkable circumstance, upon the same 7th of June, 1792, that this bond is taken for these sums, which, if the consideration was really paid, had certainly become due upon the terms of the *post obit* contracts, a bond was executed of the same date for 1700*l.* as for money advanced by Bernal; and it is now confessed, that no money was advanced for that bond; but that sum was to cover a debt to that amount supposed to be owing * upon notes passed between Da Costa and Wharton. But in the transaction of that date no notice is taken of Da Costa. It is a plain bond as for money lent by Bernal. What Bernal had to do, if there was no confederacy between him and Da Costa, with covering Da Costa's demand by taking the security in his own name, is not at all explained. When the year came

round, Wharton was called upon to come to a settlement; and pay the 9740*l.* and the 1700*l.*; and upon the 7th of June, 1793, a new transaction took place. Instead of 9740*l.* we find a new bond for 6740*l.* and a *post obit* for 3000*l.* That *post obit* was one, upon which 3000*l.* was or was not paid: but it is certain, that upon that date it could only relate to that single contingency, upon which there had at that date passed any security between the parties. Therefore it can in my apprehension refer only to the *post obit*, that was then settled, payable upon the death of Mrs. Hall Stevenson. In a month afterwards, the 6th of July, another *post obit* is taken for the like sum of 3000*l.* payable upon the death of Mrs. Farquharson; and also we find upon the same date, and making part of the same transaction, another *post obit*, in its conception for 6486*l.* in consideration of 3243*l.* supposed to be advanced, payable upon the death of General Lambton, in case he should live beyond the 25th of March, 1794, and Wharton should survive him. It did so happen, that General Lambton died a day or two before the day. Therefore only the single sum became an article of charge in the subsequent settlement of accounts as against Wharton.

I have now stated all the securities, upon which there could be any account due in June 1794. From June 1793 to June 1794 another year elapsed, and another period of arrangement arrived. But also before that period two notes were given; which came as subjects of demand in the settlement of accounts in June 1794: one for 2630*l.*, supposed to be a sum of money due from Wharton to Da Costa. The Plaintiff contends, that was originally only for 1630*l.*; and the note upon inspection appears to have been mutilated in a clumsy enough manner. The other note is for 2900*l.*, stated, when the transaction was investigated, to have been a note, which passed in account for money supposed to have been [* 62] lent by Mr. May to the Plaintiff: and which had by * May been put into the hands of Bernal; and May had received the value from Bernal; and therefore having been originally a debt from Wharton to May it came to be a debt from Wharton to Bernal.

Having stated this, it becomes necessary now, as May hitherto has had no active share in the business, to state how he came into the transaction. I will state it from his own answer. His first answer was prepared with due speed to prevent an injunction. He gives a frank and bold answer. He states himself to have been the friend and acquaintance of Wharton. He became connected with him by his residence at the same time at York. He disclaims, except a very trifling concern, having had any money transactions with Da Costa. In that trifling concern he states himself to have been acquainted with him; to have had a good opinion of him; because, having been a bankrupt, he had, after having obtained his certificate paid money to his creditors; and the aspect of the answer is, that so far from having had any transaction, in which he had become indebted to Da Costa, he had lent him money; he says he lent him a

sum of 50*l.*; and he professes to know as little of Bernal. He knew, there were such persons; but knew nothing of their transactions: but he repeats several times, that he had no idea the Plaintiff had any considerable dealings, imprudent dealings, with either of them. Having in strong terms stated his utter ignorance of any dealings of the Plaintiff with Bernal or Da Costa, he then states the history of his entering into this transaction, and the manner, in which he first became acquainted, that the Plaintiff had any money transactions with them, or became involved in any embarrassment. He repeatedly says, he gave great credit to Mr. Wharton for understanding and prudence: but the circumstance, he tells (it is well enough dressed up) is, that a Mr. Williams had consulted him upon a case of usury, and in that consultation had disclosed circumstances to him of the dealings of these persons with several persons; and among the rest he found they had been dealing very deeply with Wharton. From his regard for Wharton this circumstance pressed upon his mind; and, he being ill in bed, Wharton comes to pay him a friendly visit; and May upon his sick bed lectures Wharton; communicates to him what he was told; is sorry to find him in this distress; *talks very prudently and wisely; [*63] advises him to extricate himself; and he, being more a man of business than Wharton, offers to assist him; and tells him, how he came to the knowledge of his affairs. Wharton confused and ashamed readily accepts the offered assistance.

You observe, May swears, that this transaction passed in or about June 1794; and the date deserves attention. The answer was sworn upon the 27th of February, 1795. Swearing at that date he dates the incident of Williams in or about June preceding. It is not easy to conceive that so singular an incident, and a conversation, that produced such serious employment in Wharton's business, could remain for a few months in any confusion in May's mind. He says, this passed in or about June. I take it the first day of that month. He cannot make it later; for a little afterwards the letter authorizing May to take up the securities fixes the date of his employment in Wharton's business. But from the most certain evidence we know, (I am now giving credit for the truth of the story of Williams, credit to a certain extent) we know, this incident of Williams was long antecedent to June; for the writs issued in the actions, that were brought, upon the 6th of May. This we find from Edwards's depositions; which deserve all credit; for he is perfectly confirmed by the writs served and the appearances put in; and, when we go farther, we find, this casual client of Mr. May's, who opened the scene of usury, who, he swears, was and is a perfect stranger to him, this Mr. Williams, is brought to Edwards by Mr. May under the borrowed name of Blake, his person not being then known to Edwards, and is introduced to Edwards as the person to carry on the actions; May making use of Mr. Walton's name; and May under the name of Blake paid Edwards five guineas for the first expense of bringing the actions. The farther account is, that

Williams being asked by Edwards, where he lived, where he came from, answered he came from Bristol. Edwards naturally thought, that as Williams lived at an inn, if he should be asked at the Judge's chambers, who the Plaintiff was, and where he lived, &c. it would be necessary to have another residence. Therefore at the recommendation of Edwards he took a lodging in the Adelphi.

[* 64] A little more money was advanced to Edwards; *and afterwards he was informed, the whole business was dropped; and he was to go no farther; and Williams disappeared.

Upon this transaction I am necessarily driven to this conclusion; that Mr May's account of his entrance into the business of Wharton, Bernal, and Da Costa, is a downright fiction, a fable invented; and it is utterly impossible, that May in that answer can have stated it correctly; and farther, it is absolutely certain, that it is a deliberate, contrived, falsehood; and it takes from him, and all he can say in his own favor, every degree of credit. In consequence of that conversation with Wharton however he seems to say he had an authority to interfere, and to treat with Da Costa and Bernal on the part of his friend, and to settle "these damnable transactions (1)." He says, a few days after the receipt of the letter, dated the 27th of June, he appointed Da Costa and Bernal to meet him, in order to liquidate their demands. We find, upon the 1st of July, only three days afterwards, the meeting takes place. What time he took to think, before he sent the letter to appoint the meeting, what inspection he had of the business, is not very obvious. Supposing him really acting as the friend of Wharton, performing the duty he professed to undertake, it was utterly impossible within the time to have had an examination; especially as it was not upon the 28th or 29th of July, as appears by the answer, that they were appointed to meet.

Then what is the examination? Every one demand Bernal could bring forward, to the amount of 19,212*l.* 12*s.* 10*d.* in which is included the 2900*l.*, the note of the Plaintiff to May himself, for that is necessary to make up the sum of 19,212*l.* 12*s.* 10*d.*, all is admitted, and agreed to be the sum, for which Bernal is entitled to payment. May says, he was not able to impeach the securities by any settlement. What reason had he to settle his own note among them? It is inconceivable, how Wharton's note to May comes to be found played into Bernal's hands, to be settled among all "these damnable transactions" (2). There was a little more in the business still. Though Mr. May had no evidence to impeach

[* 65] these transactions, a few questions were to be *asked.

The 1700*l.* was no debt of Bernal's. He does not pretend it was due to him. Bernal, if the question had been put to him would, it is to be supposed, have given the answer he now does.

(1) The expression of the Plaintiff's letter, 27th June, 1794.

(2) See the Plaintiff's letter, 27th June, 1794.

So, as to the 2630*l.*; that was not his affair, but Da Costa's, to be settled with him. So, as to the sum of 3243*l.*, the consideration of the *post obit* payable upon the death of General Lambton; that also was matter of inquiry. Some examination might have been had, how the money was advanced. No: no question is asked: all is admitted. It passed as a debt Wharton was bound to discharge to the amount of 19,212*l.* 12*s.* 10*d.*

But this is not all; for we find another transaction. Mr. May, who is the friend of Wharton, who had been in an afflicting situation himself, feeling a regard for Wharton, and acting for the purpose of extricating him from his embarrassments, takes this opportunity of quietly and snugly settling his own demand. Who was the middle man there? Who settles the account between Wharton and May? And it is a very singular settlement; for he takes a bond for 4140*l.*; making Wharton debtor to him, if the account is true and fair, in the sum of 5873*l.* 14*s.* 2*d.* It was very handsome and fair, if the account is just: but it was an odd occasion, upon which Mr. May was to settle his account with Wharton; and such, that, with the credit he takes for being in some degree a man of business, it was not very prudent to put an end to all the vouchers, which were to substantiate that demand; for it is obvious, it was an account current between Wharton and May; and settling such an account, when the business he was employed in, was, not to settle his own account, but to get Wharton out of "these damnable transactions," (1) was singular.

If I was to stop here, and the case went no farther, is it possible, that this Court should not relieve against such a transaction, settled by such a person as May, settling his own affairs at the same time, and settled obviously without inquiry, examination, or any attempt to do the duty he took upon himself as the friend of Wharton? The best, that could be said for him, would be, that he was inadvertent, careless, and surprised; that he was not quite the man of business he thought himself. But that is not all; for the case * does not rest here. After this we find another transaction about the same time. But first I shall take notice of the manner, in which this settling, and what he calls extricating Wharton, was effected. The friendship he shows Wharton is, that he makes Wharton debtor to him to the same amount. The debt is shifted from Bernal to May. He makes himself creditor of Wharton for the debt of Bernal; and takes at the same time his own demand liquidated and settled; and he takes separate bonds, and for the whole sum, to cover the 19,212*l.* 12*s.* 10*d.* How is Wharton relieved? How is he the better for this? How does he get out of the hands of Da Costa and Bernal? But he puts himself into the hands of May; and does not save one single farthing by the friendly interposition of Mr. May, nor rid himself of any one difficulty. It was indifferent to him, whether he owed that sum to the one

(1) See the Plaintiff's letter, 27th June, 1794.

or the other: only that by removing the transaction farther from the original dealers any unravelling or other settlement of these accounts was made more difficult upon the part of Wharton.

Thus far I have stated the case, as it appears as to May upon his first answer: but, having dropped this circumstance of Williams, as in the course of his story affording a plea, why he should take upon himself this employment as the friend of Wharton, a little farther inquiry was made: the first answer having stated no more than I have related. I ought to notice, that Mr. Ayscough was the witness to these securities. I do not know, whether I understand it accurately: but I think, it was supposed at the bar, that Ayscough had expressed himself, that the Plaintiff had been relieved by May, and that May had got him out of a dreadful scrape. That is not so. In the answer, there is a little confusion in the expression, but it is, that Wharton said, May had got him out of a dreadful scrape, not that Ayscough passed such a judgment upon the transaction; but that the Plaintiff said so in his presence. Then Ayscough, executing the bonds as a witness, gives very little countenance to the transaction: a fair man, of Wharton's acquaintance, desired by him to witness the execution; he being very well satisfied with May's conduct; and Ayscough not inquiring farther.

Upon the second answer it comes out, that this is not all, that passed upon the 1st of July, 1794. He admits through an [*67] *immense number of falsehoods respecting Williams, that 8000*l.* had been paid as a compensation for the actions brought in the name of Williams, and paid by Bernal and Da Costa, being very much alarmed at the event of the actions, or very much afraid of their characters: it is sometimes put one way, sometimes the other; and that this payment was made, for whom? For the advantage of Wharton? No: it is distinctly sworn, that it was made to Williams. In the account with Bernal credit is taken by May for the 8000*l.* as paid to Williams. I suppose, it is hardly necessary to state much as to that, after all the evidence, that was read; and no degree of credulity can possibly be so great as to be imposed upon, now that the matter is opened a little, by the story of Williams; and considering the different accounts May gives. The former account was, that May was consulted by Williams, a perfect stranger to him. In the second answer he states, that he suspected Wharton was the director of the actions; and that suspicion continued in his mind, till Williams gave him a copy of the declaration or information. It is clear, no declaration or information ever existed. He says, that in reading that declaration or information he found, it extended to money transactions between Da Costa and other persons, naming four besides Wharton, and that Williams also informed him, which is singular information from Williams, that an action was brought against May himself in the name of Franco. From all these circumstances he concludes, that the Plaintiff could not furnish the matter of the declaration. All this is strange inven-

tion : but it goes upon circumstances clearly demonstrated to have no possible existence.

So far from the answers of May. But that is not all the evidence as to his conduct ; for they have read, and properly read, as evidence, the examination of May upon that fraudulent commission of bankruptcy, that was superseded. Upon that I find, that May for a very considerable period before was in all his transactions involved with Bernal and Da Costa continually : Bernal supporting him at York with credit : they supporting his credit ; he supporting theirs ; and I cannot forget, and it is just here to take notice, that this is not the only case, in which I find Mr. May playing all those tricks of a sharper, detected by the contradiction of his own evidence and by the evidence against him.

* The result is, that Wharton has been circumvented, [*68] deluded and cheated, into all this settlement of accounts, by Mr. May, with his eyes shut : May professing to act as his friend and agent ; but instead of managing his affairs managing his own. How far he is interested, whether he was employed by these people as a setter to engage Wharton, is not distinctly disclosed : but from the whole this result appears ; that by the confederacy and agency of these three persons, playing into each other's hands, the Plaintiff has been grossly defrauded. I cannot take upon myself to solve how the 8000*l.* came into the hands of May. Bernal and Da Costa appear to have lost that sum through his interference. It is clear, they were alarmed, and that they were glad to abate that sum in that, which they brought forth as the demand against Wharton. That sum abated was not put into the pocket of Williams. How they came to let it pass into May's, unless that upon the ground of so many other transactions they thought they could get it back again, I cannot take upon me to say. Such a transaction is completely inexplicable. One has heard a story of persons, who had settled their transactions of cheating other people, and sat down to play. One observed another packing the cards, but gave him no interruption, because he thought, he should pick the pocket of the other of what he would get by cheating the rest. Whether this was a transaction of that sort, or not, it is very clear that May, as the active, real friend, of Wharton, doing what he professed, might have taken advantage of that 8000*l.* : which among them, it is very clear, has been gained to May upon these transactions.

Upon the result of the whole I mean to state the ground of my decree, before I come to the particular directions.

By the decree, as affirmed by the House of Lords with some slight variations, it was declared, that the nine bonds for payment of 2000*l.* each, and the bond for 4150*l.* dated respectively the 1st of July, 1794, and the two bonds for 1000*l.* and 1012*l.* dated the 3d of November, 1794, given by the Plaintiff to the Defendant May, and also the warrants of attorney, &c. and also the bond for 7900*l.*, dated the 10th of July, 1794, given by the Plaintiff to the Defendant Da

Costa, and the warrant, &c. appear to have been the result of a confederacy between the Defendants Bernal, Da Costa and May, to defraud and impose on the Plaintiff, and obtained by an abuse of the confidence given to Da Costa and May, pretending to act as agents for the Plaintiff, with the privity and knowledge of Bernal, sharing in the unjust gain of the several transactions in the pleadings mentioned; and that the said bonds and judgments shall only stand as security for the sums, which shall appear to be really due from the Plaintiff upon the accounts hereinafter directed.

An account was directed of all dealings and transactions between the Plaintiff and the Defendant Bernal; in which the Plaintiff is to stand charged with 4000*l.* as due from him upon the 8th of September, 1791, on the bond, dated the 9th of November, 1789; and in respect of the other bonds, payable on the contingency of his surviving Mrs. Wharton, and also of the bond for 1200*l.*, dated the 1st of April, 1791, payable upon the death of General Lambton, it was ordered, that the Master do inquire, what was the consideration of each of those bonds; and whether the same was really paid or advanced to the Plaintiff by the Defendant Bernal at or before the execution of such bonds respectively; and in what manner the same was paid; and in case it shall appear, that the same was fully paid, that the Plaintiff stand charged with the sum, for which the bond was given; and in case it shall not so appear, that the Plaintiff stand charged with such sum only as was really received by him.

The Master was directed to inquire, whether the sum of 3000*l.* was actually paid and advanced by the Defendant Bernal to Plaintiff at or before the execution of the bond for 6000*l.* dated the 30th of May, 1793, and payable on the death of Ann Hall Stevenson; in what manner the same was paid or advanced; and whether the same or any part thereof was either returned to Bernal or wrote off in account between the Plaintiff and him on the 7th of June, 1793; also to inquire, whether the sum of 3000*l.* was really paid or advanced by the Defendant Bernal to the Plaintiff at or before the execution of the bond for 6000*l.* dated the 6th of July, 1793, and payable on the death of Frances Farquharson; and in what manner the same was paid or advanced. The Master was also directed to inquire, what was the sum really paid or advanced by Defendant Bernal to the Plaintiff at or before the execution of the bond for [*70] *6486*l.*, dated the 6th of July, 1793, on the contingency of General Lambton's death; and in what manner the same was paid or advanced; and it was ordered, that the Master do state, what he shall find to have been the sum really due by the Plaintiff (exclusive of the two bonds for 6000*l.* each) to Bernal on the 1st of July, 1794, (in his own right) and also what sums claimed by him at that date were claimed by him in trust for, or as standing in the place of, the Defendants Da Costa and May respectively; which sums in respect of the privity between him and them are to be carried to the several accounts hereinafter directed.

An account was directed of all dealings and transactions between the Plaintiff and the Defendant Da Costa ; and an inquiry, what sums had been received by Da Costa, as broker or agent for the Plaintiff, and what sums he had paid or disbursed to or for the use of the Plaintiff ; and what commission he had charged, and what he ought to have been allowed ; and an inquiry, whether the cancelled note for 2630*l.* dated the 18th of May, 1793, which is in the hands of the Plaintiff's Clerk in Court, was really given for such sum or for 1630*l.* ; and what was the consideration for the same, and when paid, and in what manner ; and the Master was to be at liberty to state that specially, and by a separate Report, if he shall think fit, and the parties desire it.

An account was directed of all dealings and transactions between the Plaintiff and the Defendant May, and of all moneys received by May for or on account of the Plaintiff, and of all sums paid or disbursed to or for the use of the Plaintiff ; and it was declared, that May, acting or pretending to act on behalf of the Plaintiff in the settlement of his affairs, ought not have credit for the sum of 8000*l.*, alleged to have been obtained as an abatement from the demands set up by the two other Defendants Da Costa and Bernal against the Plaintiff ; and that the Defendant May is entitled to hold the two bonds, dated respectively the 3d of November, 1794, which he obtained from the Plaintiff in lieu of bonds for 6000*l.* each payable on the respective deaths of Ann Hall Stevenson and Frances Farquharson, and with which he was intrusted by the Plaintiff to compound and settle with Bernal, as a security only for such sum as was really paid or *bona fide* allowed * in account between [*71] him and Bernal, when the last-mentioned bonds were given up.

The common directions were given for the production of all books, papers, &c. and the parties to be examined upon interrogatories, &c. In the mean time it was ordered, that the Defendants May and Da Costa be restrained from entering up any judgment or carrying on any action in the Court of Great Session in Scotland (1), (a), on their securities, unless upon the default of the Plaintiff to answer interrogatories or to prosecute the account, this Court shall otherwise order. The Defendants were restrained from

(1) *Bushby v. Munday*, 5 Madd. 297 ; *Kennedy v. Earl of Cassilis*, 2 Swanst. 313. See the note, 323.

(a) As to the jurisdiction in such cases, see Eden on Injunct. (2d Am. ed.) ch. 7, p. 176, 177 ; 2 Story, Eq. Jur. § 899. Without regard to the situation of the subject matter of the suit, the Court will consider the equities between the parties ; and decree *in personam* according to those equities ; and enforce obedience to its decree by process *in personam*. 2 Story, Eq. Jur. § 899. The jurisdiction of the Court may be upheld, whenever the parties, or the subject, or such a portion of the subject are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice. *Ward v. Arredondo*, 1 Hopkins, 213. See *Mead v. Merritt*, 2 Paige, 404 ; *Mitchell v. Bunch*, 2 Paige, 606 ; *Portarlington v. Soulbey*, 3 Mylne & Keen, 104 ; *Bowles v. Orr*, 1 Young & Coll. 464 ; *Graham on Juris.* b. 2, ch. 3, p. 591, *et seq.* ; *Lord Cranstown v. Johnston*, 3 Ves. Jur. 170, note (a) ; Story, Conf. Laws, § 544, 545.

assigning their securities. The Plaintiff was ordered to pay the costs of the Defendants, the fair holders of the bonds; and the Defendants May, Da Costa and Bernal, were ordered to pay to the Plaintiff those costs together with his own. The consideration of farther directions, interest and subsequent costs, was reserved, with liberty to apply (1).

May's Counsel pressed for an injunction to restrain Da Costa from proceeding against May on his collateral security for the 7900*l.*; but the Lord Chancellor refused to make any order between them in this cause.

1. WHENEVER a fair inference arises, either of ignorance on the one side as to the extravagant nature of the transactions, or of undue influence on the other part, no conveyances obtained from a distressed party, (where urgent necessities render him hardly a free agent,) can be supported as more, at the utmost, than securities for any balance which may be truly due on the account between the parties. Nor (though *laches* may sometimes protect from impeachment transactions originally of a very questionable nature,) can acquiescence be imputed, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continued to operate. *Purcell v. Macnamara*, 14 Ves. 106, 121, 122. And, in considering whether a settlement between a confidential agent and his employer can stand, it will be necessary to ascertain whether such settlement was the free, uninfluenced, well understood act of the employer's mind, enlightened by a full knowledge of all the circumstances which it was the duty of the agent to communicate: *Harris v. Freemanheere*, 15 Ves. 40: a farther question will also be — not merely whether the party agreeing to the settlement knew what he was doing, but — how that intention was produced? with reference to which, the situation of the employer as to pecuniary circumstances must be attended to. *Huguenin v. Basely*, 14 Ves. 300.

2. *Post-obit* securities will, on grounds of public policy, be strictly examined; and very great inadequacy of consideration may, of itself, be sufficient to induce a Court to presume oppression: *Darty v. Singleton*, Wightwick, 29; *Croze v. Ballard*, 1 Ves. Jun. 220: but, though *post-obits* in general are not to be countenanced in Equity, (*Earl of Chesterfield v. Janssen*, 1 Atk. 347, 353,) still it is not of necessity that *post-obit* bonds must be affected, merely by showing that the money might have been procured on more reasonable terms. *Turling v. Marquis Townsend*, 19 Ves. 634.

3. As to the right of injoining proceedings in the Court of Great Session in Scotland, see, *ante*, the note to *Lord Dillon v. Alvares*, 4 V. 357.

4. The decree made in the present suit was affirmed, on appeal, by the House of Lords, in the year 1807.

(1) This decree was affirmed in the House of Lords on the 10th of August, 1807.

M'LEAN v. LONGLANDS.

[ROLLS.—1799, Nov 25.]

TESTATOR having proved the value of annuities, secured to the separate use of his wife, as a debt under the bankruptcy of the grantors, his assets were charged with the dividends only, upon the foot of that transaction, not with the annuities, as subsisting.

A claim by the testator's widow to dividends, to which he was entitled under a bankruptcy, as a gift by him to her separate use, failed; the evidence not even affording a sufficient ground for directing an issue. (a)

GENERAL M'LEAN having purchased from Hutchinson Mure and William Mure three annuities of 200*l.* 300*l.* and 350*l.* the first for the lives of General M'Lean and his wife and the survivor, the second for her life, and the third for his life, singly, all secured by the joint and several bonds of the Mures, by indentures, dated the 21st of September, 1789, assigned all the said annuities to John Ogilvie and Edmond Elliston, their *executors, [*72] &c. upon trust to permit his wife Jane M'Lean to receive all the arrears due at his decease; and in case he should die in her life, then as to the annuities of 200*l.* and 300*l.* from and after his decease in trust to pay an annuity of 27*l.* to Margaret M'Lean for life, and the like annuity to Susannah M'Lean, an annuity of 20*l.* to Betty M'Lean, and such other annuities, not exceeding 50*l.* per annum, as he should at any time direct; and upon farther trust to pay to and empower the said Jane M'Lean and her assigns to receive the said two annuities, subject to the said payments.

The Mures becoming bankrupt, General M'Lean was admitted a creditor upon their respective separate estates for 4613*l.* and upon the joint estate for 8590*l.* 7*s.* 8*d.* and 3713*l.*, being the calculated value of the annuities.

General M'Lean, having no issue, by his will, dated the 10th of May, 1796, made a general disposition of his real and personal estate to his wife, her heirs, executors, administrators and assigns; and appointed her sole executrix. Afterwards by a codicil he appointed Ogilvie and Longlands to be joint executors with her; and reciting, that he had given her all his property absolutely, he revoked such absolute bequest, except as to plate, jewels, and household furniture; and gave the enjoyment of all the rest of his property to her during her natural life; and directed, that after her death that property should revert to James Allen Parke and Lauchlan M'Lean, his nephews.

The will was duly attested by three witnesses. The codicil was unattested. The testator died upon the 18th of February, 1798. His widow and the other executors proved the will and codicil.

After the death of the testator the bill was filed by the widow, on behalf of herself and the other surviving annuitants, and the trustees

(a) See 2 Story, Eq. Jur. § 1375.

under the settlement, the widow claiming out of the assets, first, the sum of 1850*l.* as a gift made by her husband in his life-time to her sole and separate use ; and, secondly, an annuity of 500*l.*

[* 73] a year for her life, subject to the other * annuities, according to the settlement. In support of the latter claim the bill charged, that the testator without consulting his wife or any of the other persons elected to give up the said several annuities, and to prove the sum of 8326*l.* as a debt under the Commission in respect of them ; and that he received several dividends ; and others are expected ; which in the whole will amount to more than sufficient to purchase an annuity of 500*l.* and upwards for the life of the Plaintiff ; and that the commutation of the annuities for a sum of money cannot affect her right under the settlement. The prayer of the bill was, that an account may be taken of the debts, legacies, and funeral expenses of the testator, and of his personal estate ; that the Plaintiff may be at liberty to deduct 1850*l.* out of his estate ; and that out of the residue an annuity of 500*l.* for her life, subject to the other annuities according to the settlement, may be secured ; and that she may be permitted to receive the interest of the remaining part of the personal estate for her life, &c. according to the will.

The nephews of the testator, Parke and M'Lean, by their answer stated, that at the time the Commission issued the penalties of the bonds were forfeited ; the annuities being in arrear ; and that upon an appeal to the King in Council from a judgment obtained by the testator in Jamaica it was determined, that an agreement signed by the executors of Atkinson, a deceased partner with the Mures, was void ; and that the testator had no remedy ; and the only compensation he could obtain was by procuring himself to be admitted a creditor under the Commission ; and the Defendants denied, that he elected to prove under the Commission and give up the annuities. They stated, that the Plaintiff in many conversations approved of his proving under the bankruptcy, and relinquishing any claim as for subsisting annuities.

In support of the Plaintiff's claim to 1850*l.* John Lewis deposed, that upon the 6th or 7th of February, 1798, he was requested by the testator and his wife to accompany him to Guildhall on Saturday the 10th for the purpose of receiving a dividend from the estate of the Mures, amounting, as was supposed, to about 2000*l.* ; and which dividend, when so received, was intended by General M'Lean to be immediately paid over or delivered to his wife for her own

[* 74] proper use and benefit ; for he then, and had * at various other times, declared, that the money accruing from the said dividend should, so soon as it was received, be delivered into the hands or disposal of his wife, to be by her either vested in the whole or in part in the public funds or upon mortgage, as he should choose, in the names of trustees, for her own separate use ; and it had been agreed between him and his wife, that the deponent should be one of the trustees ; General M'Lean also declared the same

intention respecting the dividend afterwards; and in particular, when the deponent called according to the appointment on Saturday the 10th, notice having been received, that the dividend was deferred to Tuesday, and the Plaintiff expressing some dissatisfaction at the delay, General M'Lean then told her, that she should give herself no uneasiness upon that account; for the dividend would assuredly be paid on Tuesday next; and she should immediately receive it, and make what use of it she thought proper. Upon the 15th of February, the deponent was informed by the Plaintiff that Callender had in pursuance of her husband's directions and authority delivered to her two checks, drawn by the assignees upon their bankers, for 1850*l.* payable to Ann M'Lean or bearer, on account of the said dividend. She produced the checks; and the deponent advised her immediately to demand payment from the bankers, and to apply and vest the money for her use according to the repeatedly declared intention of her husband, and he so advised her under the apprehension, that in case her husband should die, before the money should be applied or vested, and he should not have destroyed the codicil, which the deponent understood he intended, some trouble or difficulty might arise to her respecting the said money: but the deponent did not disclose his reason to her on account of his promise to the testator not to mention the transaction as the codicil. As the deponent did not assign any special reason for her demanding the money immediately, she chose to defer it from motives of delicacy; her husband being then very ill; and she then said, Callender had informed her, she could receive payment, when she chose to demand it either personally or otherwise. The deponent often heard General M'Lean say, he had lost a large part of his property by lending money upon bad securities; and he lamented the loss with tears, not upon his own account, but his wife's; of whom he always spoke with great tenderness and affection; especially, as she bore with so great patience such a diminution of her fortune and expectations caused by his imprudence. He declared, he considered *himself bound in justice as well as honor to [* 75] leave her the whole of his estate, that remained; and he regretted he had not more to leave her.

William M'Lean deposed to a conversation in his presence upon the 11th of February, 1798, relating to the dividends due from the estate of the Mures, amounting, as was supposed, to about 2000*l.*; which had been postponed from the 10th to the 13th. In the course of that conversation General M'Lean gave directions and authority to Callender to receive the dividends, and pay the same, or 1850*l.*, part thereof, to his wife for her own sole and proper use and benefit, and to keep the residue in his hands, until he received farther directions.

This witness also stated, in the same manner as the last, that the Plaintiff a few days afterwards informed him, that Callender had delivered to her two checks for 1850*l.* &c.

Henry Callender deposed, that he was in habits of great intimacy

with the testator ; and previously to the dividend being declared he requested the deponent to retain a part thereof and pay a bond debt of 100*l.* and also 70*l.*, which had been advanced on account of the dividends ; and the remainder was to be paid to the testator himself. The deponent having heard, that the testator was indisposed, and having been repeatedly told by him, that he had most pressing occasion for money to discharge debts, went to his house upon the 15th of February, 1798, intending to pay him 1650*l.* in part of his dividend upon the joint estate and 200*l.* on account of his dividend upon the separate estate of Hutchinson Mure ; the deponent being employed by the assignees in the management of the affairs of the bankrupts. He found the testator sick in bed, and incapable of speaking to him or of transacting business ; and to the best of his remembrance and belief he did not mention to the testator the occasion of his coming there : but he did mention it to the Plaintiff ; and proposed to leave the checks with her ; but upon condition that they should not be sent into the banker's for payment, until proper receipts were given, either by the testator himself, in case he recovered from his illness, or by his personal representatives in case of his death ; and the Plaintiff having consented to receive

[* 76] the checks on those terms, the deponent delivered * them to her accordingly for the use of the testator : and the deponent did not make any offer to her to fetch bank notes or cash for the said checks or either of them. The deponent and the Plaintiff were the only persons present at the delivery of the checks to her. The testator was not capable of giving any directions as to the payment. The deponent previously to the 15th of February, and to the best of his recollection on or about the 10th, called on the testator to inquire after his health, and apprise him, that a dividend upon the joint estate had been declared, and that a dividend upon the separate estate would be declared on the 13th : but he never called for the purpose of paying the testator the sums of 1650*l.* and 200*l.* on any other day than the 15th. The testator never did give him any directions for paying the said money or any part of the dividends to any person, or express any wish, desire, or intention, respecting the application thereof : but the deponent delivered the checks to the Plaintiff for the use of the testator, as before deposed, and for no other use whatsoever.

Callender stopped payment of the checks ; and they were not paid till the 2d of July, 1798 ; when they were received under the probate by Mrs. M'Lean and the other executors.

With respect to the question upon the Plaintiff's right under the settlement it was admitted, that there were no creditors, whose rights came in competition with her. It was contended, that the annuities having never been in arrear (1), and consequently the bonds not forfeited, and General M'Lean having proved the value as a debt under the Commission without the consent or privity of

(1) There was no evidence in opposition to the answer as to this.

the trustees, the Plaintiff was entitled, considering his conduct as a breach of trust, to have annuities to the extent of her right under the settlement secured to her out of his personal estate; or at least, if he should be considered as having acted for the best in proving the debt, and therefore she should acquiesce in that measure, the Plaintiff claimed for her absolute use all the dividends proceeding from the bankrupt estates in respect of the value of the two annuities settled upon her.

After some discussion upon this point, and an intimation from the Court, that there might be considerable difficulties in the way * of the claim to the extent first mentioned, the [* 77] Plaintiff's Counsel restrained it to the latter part of the alternative; and the Court expressing a very clear opinion, that the Plaintiff was entitled to all, that the bankrupt's estate paid upon the proof in respect of the value of the two annuities settled upon her, the Defendant's Counsel acquiesced in that opinion.

The next question arose upon the Plaintiff's claim to the sum of 1850*l.* as an absolute gift from her late husband.

Mr. Piggott and Mr. Graham, for the Plaintiff. This was not strictly *donatio mortis causa* (1); as it was not given in contemplation of death, nor upon condition, that the donor died; but was an absolute, unconditional, gift, without relation to the time of the death of the donor or the duration of his life: yet it was such a disposition as this Court would support against all claiming as volunteers under the donor. It is now too late to deny, that, though at law a man may not make a gift to his wife, a gift of property to her separate use, accompanied with delivery, will be supported in Equity. In this instance the gift is complete; for, whether money or bank notes or cash drafts, were put into her hands, the same rule would prevail; and the delivery is not the less complete, because drafts payable to bearer were given, and not specie. The *bona fides* of the transaction cannot be impeached; nor the piety of the motive be questioned. No fraud, circumvention, or practice, can be imputed to the Plaintiff. The intention was not suddenly conceived, and instantly executed. The application of the drafts, when brought, upon the 15th of February, did not depend upon Callender, the agent of the assignees. He could not by tacking any condition to the delivery disappoint the intention and direction of the testator. The condition, which he says he annexed to the delivery, was a condition necessary for the assignees; who were entitled to a receipt from General M'Lean, or from his representatives, if he was dead at the time of payment. Callender could not, as agent for the assignees, dispense with a legal discharge for their

(1) For the distinctions upon this subject and a correct description of *Donatio mortis causa* upon a minute examination of the authorities by the Lord Chancellor, see *Talc v. Hilbert*, ante, vol. ii. 111; [note (a) (Am. ed. 1844); *Blount v. Burrow*, 1 Ves. jr. (Am. ed. 1844), 546, note (a); *Hill v. Chapman*, 2 Bro. C. C. (Am. ed. 1844), 613, note (a); 1 Williams, Executors, (2nd Am. ed.) 544-554; *Talc v. Hilbert*, 4 Bro. C. C. (Am. ed. 1844,) 294, note (b).]

security. But that was *diverso intuitu*; and as between the donor and donee could not defeat the gift. Callender speaks particularly to what passed upon the 15th of February: but he has not stated what passed upon the 10th; when the direction was distinctly and finally given for the payment of the money to the Plaintiff.

But if the contradiction in the evidence should be sufficient to prevent the Court from acting in the first instance, a more satisfactory inquiry into the circumstances will be directed either before the Master or by an issue.

Mr. *Richards* and Mr. *Cooke*, for the Defendants. No sufficient grounds are brought forward to induce the Court to act upon what has rather been intended than done; what probably had been interrupted by the testator's death, but still was not completed during his life. There is no writing manifesting this gift. It rests wholly in parol; and, though we see no reason to doubt, that it was his intention at the times spoken of to give the money, and it is not unlikely, that if he had then actually received it, he might have executed that intention, and have actually given it, it is now sufficient to disappoint this claim, that the money was not then received, nor any notes for it in the possession of the testator. It is unnecessary to consider, how he would have actually applied the notes upon the 15th of February, when they were first brought to his house, or the money, when they were paid. Upon the 15th, the evidence of Callender shows, he was incapable of acting upon his property. He did not then act upon it; and it was then, and not till then, that he could have delivered even the notes for the money. It might have been his intention to give it upon the 11th: but he had it not then to give. It was then a *chose in action*, a debt due to him. There could then be no delivery; and upon the 15th he was incapable of acting. The gift, to have effect, must have been perfected by delivery; and resting upon parol evidence, both the intention and the execution of that intention must be clear and precise beyond a doubt, to induce the Court to act upon the subject. The will confirms the evidence, that the testator had talked in this way; but the codicil shows an alteration of intention. Callender was not examined by the Plaintiff. Shall she consider the dividends as her own, contrary to the intention of the testator, and also have the personal estate for life?

[*79] *MASTER OF THE ROLLS (1) [Sir RICHARD PEPPER ARDEN]. It is very clear, that what came in lieu of those annuities she must have, subject to the claims of the other annuitants.

The only point, upon which I entertain any doubt, is as to the gift; but I do not think there is sufficient ground to direct an issue. Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property, and engaged to hold it as

(1) The judgment and arguments are stated *ex relatione*.

a trustee for the separate use of his wife (a). If I were to admit declarations of intention or of a disposition of property to the use of his family, I should let in a sort of evidence, and upon a principle, that would have a most extensive effect. But I will even suppose, he had given Callender distinct directions to pay to the separate use of his wife: does that vest it in her: does that make Callender a trustee for her; and could she in this Court compel execution of such a trust? But the money was not paid by Callender; and Callender did not act as if he understood, he had received any directions. Under these circumstances, I do not think, there is sufficient ground to direct an issue. The issue could only be, whether upon Saturday, the 10th of February, 1798, there was an assignment of this property to the Plaintiff: for before it was clearly an intention only. I do not like to refuse an inquiry, where the parties require it; and therefore I will read the depositions. (b)

The MASTER OF THE ROLLS did not change his opinion; and the decree was drawn up accordingly. An inquiry was directed, what dividends had been received under the bankruptcy upon the two annuities.

1. In Equity a gift by a husband to his wife may, under circumstances, be valid; but those circumstances, and the whole transaction, must be established by evidence beyond suspicion: *Walter v. Hodge*, 2 Swanst. 104: where the principal case is cited.

2. With respect to the nature and properties of a *donatio mortis causa*, see, *ante*, note 3 to *Blount v. Burrow*, 1 V. 546.

(a) A husband cannot convey land by deed *directly* to his wife. *Martin v. Martin*, 1 Greenl. 394.

(b) As to the right of parties to an issue and trial on matters of fact, see *Bishop v. Chichester*, 2 Bro. C. C. (Am. ed. 1844,) 163, note (a), and the cases there cited; *Marston v. Brackett*, 9 N. Hamp. 336; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 367, 369; *Lee v. Beatty*, 8 Dana, 207; *Iler v. Routh*, 3 How, 276; *Munson v. Reed*, 1 Clarke, 580.

FREEMANTLE v. BANKES.

[1799, Nov. 27.]

DISTINCTION between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter; (a) and parol evidence of an intention to satisfy cannot be admitted originally; as it may, where first introduced to repel a presumption. (b)

RICHARD WYNNE by his will, dated the 16th of October, 1788, reciting that the sum of 12,500*l.* Bank 4 per cent. Annuities then stood in the names of trustees, in trust after his death to [*80] *secure to his wife Elizabeth Agathee Wynne during her life an annuity of 400*l.*, and subject to the said annuity, the said stock was entirely at his disposal, and that he had transferred the farther sum of 3000*l.* Bank 4 per cent. Annuities to trustees, upon trust to secure to Lewis Borgue an annuity of 100*l.* during his life; and subject to the said annuity, in trust for himself, bequeathed to the Defendant Bankes and two other persons the said 12,500*l.* Bank Annuities, subject to the said annuity of 400*l.* and the said 3000*l.* Bank Annuities, subject to the said annuity of 100*l.*, upon trust to apply the said capital two sums and the interest and dividends thereof to such and the like uses and purposes, as are therein after declared of the residue of his estate; and after giving to Mary, Countess of Montalban, a legacy of 4000*l.* he bequeathed all the residue of his estate and effects whatsoever and wheresoever to the said trustees, &c. in trust out of the said residue in the first place to pay all his just debts, funeral expenses, and charges of proving his will and executing the said trust, and the said legacy, and any legacy, that he might give by any codicil; and in the next place to lay out all the clear residue of his estate and effects in the public funds or upon real securities, and out of the interest and dividends, if sufficient, and, if not, out of a sufficient part of the principal, of his said residuary estate, to pay several annuities; and upon farther trust, that they should out of the said residue of the said estate

(a) See 2 Williams, Executors, (2d Am. ed.) 955-957; Fonbl. Eq. b. 4, p. 1, ch. 2, § 1, note (a); *Rickman v. Morgan*, 2 Bro. C. C. (Am. ed. 1844,) 396, note (c); *Smith v. Strong*, 4 Bro. C. C. (Am. ed. 1844,) 494, note (a).

The reason for this distinction is said to be, that in the case of a residue it is always changing. It may amount to something, or be nothing; and, therefore, no fair presumption can arise, of its being an intended satisfaction or ademption. 2 Story, Eq. Jur. § 1115.

As to the presumption of satisfaction in general, see 2 Story, Eq. Jur. § 1099, *et seq.*; 2 Williams, Executors, *ubi supra*; *Ellison v. Cookson*, 2 Bro. C. C. (Am. ed. 1844,) 307, 309, note (a); *Paine v. Parsons*, 14 Pick. 318, 320; *Richards v. Humphreys*, 15 Pick. 139.

(b) As to the admission of parol evidence in such cases, see *Ellison v. Cookson*, 2 Bro. C. C. (Am. ed. 1844,) 307, 309, notes (a) and (b); S. C. 3 ib. 61; 2 Story, Eq. Jur. § 1114; *Jones v. Mason*, 5 Rand. 577; *Timberlake v. Parish*, 5 Dana, 351; *Dwyer v. Lyaght*, 2 Ba. & Be. 156; 3 Phillips, Ev. (Cowen & Hill's notes) p. 1494, 1495; 1 Greenleaf, Evidence, § 296; *Richards v. Humphreys*, 15 Pick. 139.

yearly, until his four daughters or any other child of his body, who should be living at his decease, or born in due time afterwards, should attain their respective ages of twenty-one years, or be married, pay his said wife or the guardians of his said children for the time being for the use of such of the said children, the several annuities of 150*l.*, to be applied and disposed of for or towards the maintenance and education of his said children, or otherwise for their use and benefit, as his said wife or guardians should judge proper; the said annuities to be free from all deductions whatsoever; and in case there should be any surplus of the interest, &c. of the said residuary estate, after paying the said annuities, upon trust, that they should from time to time invest such residue and securities, as aforesaid, in order that the same might accumulate for the benefit of the persons, who would become entitled to the said residuary estate under his will; and upon farther trust, that they should stand possessed of the said residuary estate in trust for all and every child and children of the testator, who should be living at the time of his death, or born in *due time afterwards, equally [*81] to be divided among them, share and share alike, and to be a vested interest in, and payable and transferable to, such of the said children as should be sons on their attaining the age of twenty-one years, and to daughters upon their attaining that age or marrying, which should first happen; provided such marriage be with the consent of his wife during her life, and, after her death, of the guardians; and in case of the deaths of any of the sons under the age of twenty-one, or of the daughters under that age or unmarried with such consent, then that the shares of the children so dying in the said testator's residuary estate, as well as what might have accrued under the said clause, should go to the survivors, and be equally divided between them, payable at such times as their original shares; and in case there should not be any child, who should live to attain a vested interest in the said residuary estate under the said will, then upon trust that they should assign the same unto such person or persons as should be nearest related to the testator at the time of his death; provided that in case any of his daughters should marry under twenty-one without such consent, then the trustees should sell, assign and assure, for the benefit of such daughter or daughters only the interest and dividends of her or their share of said trust moneys for life, for her or their separate use, and subject to such life estate to and among all the children of such daughter or daughters, as tenants in common; and for default of such issue to and among all other the daughters, who should marry with such consent as aforesaid. The testator then appointed the trustees his executors.

In January, 1797, Elizabeth Wynne, one of the daughters of the testator, with the consent of her father married Thomas Francis Freemantle at Naples, where they were all then resident; and by a previous article executed by the testator and Mr. Freemantle, it was declared, that in contemplation of the marriage the testator and Freemantle bound themselves in the following article, until a mar-

riage contract should be executed in a more regular form : that is to say the testator bound himself, his heirs and executors, to transfer immediately, or as soon as powers could be transmitted to London, to Mr. Freemantle such a sum of capital stock in the public funds, as would produce to him a net annual interest of 400*l.* ; which capital stock he thereby granted to Freemantle as the marriage portion of his daughter, to be by him disposed of, as he might afterwards * think fit ; and Freemantle bound himself, his heirs and executors, to vest the sum, which should be so transferred to him, in trustees, in trust to pay the dividends to himself for life, and after his decease, if Elizabeth, his intended wife, should survive him without issue of said marriage, to pay the dividends to her for life ; and after her death to apply the said capital stock in the manner, that should be at any time after directed by him in writing ; and in case she should survive him with issue of said marriage, the said capital sum and the dividends, &c. should be applied for the benefit of her and said children of them in such manner and proportions as should at any time be directed by him under his hand.

After the marriage transfers were made accordingly by the testator of 10,000*l.* 4 per cent. Bank Annuities, to Mr. Freemantle, and by him to trustees. The testator died in January, 1799. The bill was filed by Mr. and Mrs. Freemantle against the executors and the three other daughters of the testator, who were all unmarried ; the Plaintiffs claiming a fourth part of the residue of the testator's personal estate under the will ; and the Defendants, the other daughters, insisting, that the portion advanced upon the marriage of the Plaintiffs must be considered as an ademption or satisfaction of the bequest of a share of the residue, or as a part satisfaction ; and that the Plaintiffs ought not to receive any part of the residue, until each of the Defendants shall have received a sum equal to the value of 10,000*l.* Bank 4 per cent. Annuities.

The testator's widow being examined for the Defendants stated by her depositions, that he several times declared, he meant to make no difference between his children but to provide for them equally ; and particularly, that, after the Plaintiff's marriage, in a conversation upon the subject of his daughter Eugenia being married, he declared, that though he was unable immediately to pay down so large a fortune as he had given the Plaintiff, Eugenia should be no loser by it ; and he would engage by marriage articles to give her at his death the same as he had given the Plaintiff ; and that his other daughters should have equal portions.

The *Attorney General* [Sir John Mitford], Mr. Mansfield, and Mr. Bell, for the Plaintiffs. This point has been settled, so
 [* 83] that it is not now to be *questioned : *Farnham v. Phillips* (1). *Watson v. Lord Sondes* (2), a case frequently

(1) 2 Atk. 215.

(2) Cited 1 Bro. C. C. 65, in the argument of *Richman v. Morgan* ; and reported by the name of *Watson v. The Earl of Lincoln*, Amb. 325.

called *Pelham v. Lord Lincoln*. In the former Lord Hardwicke had distinctly in his view the distinction between the cases of a legacy and of a residue. The concluding reason there, that the residue is the remainder of the estate beyond all that may have been taken out by the testator himself in any manner whatsoever during his life, is decisive. The very term "residue" excludes all consideration of what the testator has done in his life. In *Smith v. Strong* (1), the testator having given several legacies to his three natural children, and also the residue among them, your Lordship thought, a portion advanced on marriage was not a satisfaction of a share of the residue, on the authority of *Farnham v. Phillips*, and particularly the concluding reason. *Richman v. Morgan* (2), which will probably be cited against the Plaintiffs, is a case of a very different description upon the express proviso. Lord Thurlow thought the words of the settlement bound them. It did not depend upon the intention of the testator. He had it in his power to declare, the advancement should not be a satisfaction; and he did not make that declaration.

The *Solicitor General* [Sir William Grant], for the three other daughters, Defendants. This advancement is a satisfaction *pro tanto*. The principle, upon which an advancement has been held a satisfaction of a legacy to a child, when that legacy is intended by way of portion, is, that a child shall not have a double portion (3). Though this is clearly by way of residue, yet that was the mode in which the testator has provided portions for his children; for no other portion is provided. The distinction is not very clear between his sitting down and making a calculation of a nominal sum, to which he supposes his property will amount, and his giving them equal parts of his property without making that calculation. It is very clear, and is admitted, that if he had made that calculation, it would have been a satisfaction. In *Farnham v. Phillips* the question was not absolutely decided. It might have been considered a satisfaction *either for the orphanage or the testamentary [*84] part. It was held a satisfaction for the former. A gift of the orphanage part is just as indefinite as a residue. It is not a specific sum. In *Watson v. Lord Sondes* this was not taken to be a settled point; though Lord Hardwicke inclined to think the portion could not be a satisfaction for the share of the residue: but he seems to have avoided the question, as there was no probability of any personal estate beyond the amount of the debts. In *Richman v. Morgan*, notwithstanding the proviso in the settlement was, that the advancement should go in satisfaction, unless otherwise declared, the question raised was, whether a gift of the residue could be held equivalent to an advancement of money or land. Lord Thurlow said, the gift of a residue meant so much as it should be worth, the money it would produce.

Another question is, whether the parol evidence can be admitted.

(1) 4 Bro. C. C. 493.

(2) 1 Bro. C. C. 63.

(3) *Copley v. Copley*, 1 P. Will. 147.

In that respect *Farnham v. Phillips* has been departed from, and evidence admitted upon this ground, that it is not upon the construction of the will, but an act extrinsic; and the question is, how the testator intended that act to operate. The will is clear: but by an independent act he has made satisfaction. During Lord Thurlow's time evidence was often admitted: *Debeze v. Mann* (1). *Ellison v. Cookson* (2): *Coote v. Boyd* (3), as to double legacies, in which it was contended, that evidence was admissible to rebut the presumption, but not to raise it: Lord Thurlow said, if it is admissible on one side, it must be admissible on the other: that the question, whether by giving two legacies the testator did not intend the legatee to take both, was a question of presumption, *donec probetur in contrarium*, and would let in all sorts of evidence: but, where the presumption arises from the construction of words simply, no evidence can be admitted. This question does not arise upon the construction of words, but upon an act done; what was the intent of that act. The evidence in this case is very clear.

The *Attorney General*, [Sir John Mitford], in reply. In *Debeze v. Mann*, the evidence was admitted to show, it was not a satisfaction. It is admissible to rebut a presumption. But this case is not at all like those cases of presumption from the advancement of a child in the life of the * testator. The question here is, what the residue means upon the face of the will; and parol evidence is offered to show, the testator did not mean the residue, but after certain deductions. That is to give a construction to the will. The point was decided in *Farnham v. Phillips*, and in *Watson v. Lord Sondes*; where the question was distinctly before the Court; and it was held, that a legacy was satisfied and a residuary bequest was not.

LORD CHANCELLOR [LOUGHBOROUGH]. If the point upon the parol evidence is a point of moment, and the evidence comes up to it, the cause should not have been set down as a short cause. My inclination is always against parol evidence. To admit it in this case would be to admit parol evidence to make part of the will. In the cases referred to, of the advancement of a child in the life of the testator, it was to rebut an equity (4).

The fallacy of the argument is considering a gift of a residue as a gift of a portion. It never can be so considered. The idea of a portion *ex vi termini* is a definite sum. The testator specifies this as part of his property, that is subject to all such debts as he may contract, and such legacies as he may give. Then what remains, which is from its nature indefinite, he gives to his daughters. If it is a question of value, I will give more time to consider it: but if any one had put the question to me in the abstract, I should have

(1) 2 Bro. C. C. 165, 519.

(2) 2 Bro. C. C. 306; 3 Bro. C. C. 61; *ante*, vol. i. 100; see the notes, 112, 259.

(3) 2 Bro. C. C. 521.

(4) *Eden v. Smith*, *post*, 341; see the note, *ante*, vol. iii. 530.

said, it was a settled point. So much did I consider it settled, that when you began to state it, it occurred to me as decided; and the very case of Mr. Pelham's will occurred to me. The printed Report must be erroneous; for, no doubt, the residuary estate there was considerable. *Richman v. Morgan* is a case of a very different description. The sum of 8000*l.* to be raised was a debt contracted upon the marriage; and the eldest son had a right to say, the estate should be freed from that charge by the residue, unless the father had otherwise designed it.

I will make the decree now according to the prayer of the bill: but it shall rest in minutes, in case upon consideration you think it deserves more argument.

The decree was drawn up accordingly without farther notice.

1. THAT a portion given to a child, by a testator in his life-time, is a presumptive ademption of any provision made for that child by a previous will of the testator; but that such presumption may be rebutted by parol evidence, see, *ante*, the notes to *Ellison v. Cookson*, 1 V. 100, note 6 to *Blake v. Bunbury*, 1 V. 194, and note 2 to *Barclay v. Wainwright*, 3 V. 462.

2. The doctrine of the principal case, that a bequest of a residue can never be considered as a satisfaction of a portion, requires to be qualified: see the concluding part of note 3 to *Wilson v. Piggott*, 2 V. 351.

CHETHAM v. GRUGEON.

[* 86]

[1799, Nov. 13, 28.]

BIDDINGS opened after the Report confirmed simply upon an advance of 61*l.* on 305*l.*, 35*l.* not sufficient (a)

MR. PEMBERTON moved to open biddings upon an advance of 35*l.* on 305*l.*

Mr. *Johnson* for the purchaser resisted the motion on the ground,

(a) As to the causes for opening biddings and the practice thereon, see *Anonymous*, 1 Ves. jr. (Am. ed. 1844,) 453, note (a), and cases cited; 2 Smith, Ch. Pr. (Am. ed.) b. 3, ch. 27, p. 235, *et seq.*; 1 Barbour, Ch. Pr. b. 2, ch. 3, p. 537, *et seq.*; 1 Sugden, Vend. & Purch. (6th Am. ed.) ch. 2, § 3, p. 86, [122] *et seq.*; *Goodall v. Pickford*, 6 Sim. 379; *Ward v. Cooke*, 9 Sim. 87.

In Ireland a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed and registered, because another person offered an advance upon what the purchaser had paid. *Conran v. Barry*, Vern. & Scriv. 111; see *Partington, ex parte*, 1 Ball & Be. 209; see also *Mayne v. Macartney*, 2 Irish Eq. 324; *O'Connor v. Richards*, Sausse & S. 246.

The English practice upon this subject, of opening biddings on an advance, has not been adopted in New York, and the Chancellor observes, in the case of *Duncan v. Dodd*, 2 Paige, 100, that it is not desirable that it should be introduced there. See also to the same effect, *Collier v. Whipple*, 13 Wend. 224. See as to the practice on this head in other States, *Anonymous*, 1 Ves. jr. (Am. ed. 1844,) 453, note (a), and cases cited; *Scott v. Nesbit*, 3 Bro. C. C. 475, notes (a) and (b) and cases cited; *Gardner v. Schermerhorn*, 1 Clarke, 101; *Andrews v. Scotton*, 2 Bland, 629; *Henderson v. Lowry*, 5 Yerger, 240; *Williamson v. Dale*, 3 Johns. Ch. 290; *Young v. Seague*, 1 Bai. Eq. 114; *Seaman v. Higgins*, 1 Green. Ch. 214; *Langing*

that the advance was too small, and also, that an order for confirming the Report *nisi* had been obtained near a fortnight; and the Report had since been absolutely confirmed.

Lord CHANCELLOR [LOUGHBOROUGH], said, they must bid more.

On the 28th of November the motion was repeated by Mr. Roupel; who offered an advance of 61*l*.

Mr. *Ainge* for the purchaser contended, that the practice is not to open biddings, after the Report is confirmed, unless there are special circumstances; and that upon that ground the former motion was refused.

The Lord CHANCELLOR said, the ground upon which the former motion was rejected, was, not that now suggested, but that the sum was not sufficient; and granted this motion (1).

As to opening the biddings, after a sale before the Master, and a report confirmed, see, *ante*, the *Anonymous case*, 1 V. 453.

HEWART v. SEMPLE.

[1799, Nov. 28.]

PLAINTIFF in a bill for discovery only is not entitled as of course to two Terms to except to the answer filed in the vacation.

THE bill was for a discovery only. The answer was filed in the vacation.

On the part of the Defendants a motion was made for an order for payment of the costs of the discovery (a).

Mr. *Roupel* for the Plaintiffs contended, that they were entitled as a motion of course of two Terms to except to the answer.

[*87] * Mr. *Short* for the Defendants admitted that, upon a bill for relief (1); but denied the practice to be so upon a

v. M'Pherson, 3 Johns. Ch. 424; *Gordon v. Sims*, 2 McCord, Ch. 158; *Post v. Leet*, 8 Paige, 337; *Tripp v. Cook*, 26 Wend. 143; *Anderson v. Foulke*, 2 Har. & Gill, 346.

The effect of opening the biddings, is to discharge the purchaser from his purchase entirely. If he has purchased several different lots, and the subsequent lots were purchased in consequence of his having been declared the best bidder for those preceding, and the biddings are opened as to the preceding lots, he will be discharged from his purchase as to all the lots purchased by him. 1 Barbour, Ch. Pr. b. 2, ch. 3, p. 537, 538; *Price v. Price*, 1 Sim. & Stu. 386; *Fielder v. Fielder*, cited, 1 Sim. & Stu. 386.

(1) *Ante*, *Upton v. Lord Ferrers*, vol. iv. 700; see the note, vol. ii. 55, to *Watson v. Birch*.

(a) After the expiration of two months, when by the New Orders, the answer is deemed to be sufficient, the defendant may obtain an order of course for the taxation of his costs. 1 Smith, Ch. Pr. (Am. ed.) b. 2, ch. 8, p. 502, 503; see 1 Madd. Ch. Pr. (4th Am. ed.) 217; 2 ib. 345.

(1) 3 Atk. 19; *Thomas v. Llewellyn*, *post*, vol. vi. 823. It has been since held upon inquiry into the practice, that there is no distinction upon a bill of discovery. *Baring v. Prinssep*, 1 Madd. 526; Beames on Costs, 29, 30.

bill for discovery only; the Plaintiff being entitled only to the first eight days of the Term.

Lord CHANCELLOR [LOUGHBOROUGH], granted the motion; observing, that two Terms would be a very unreasonable time.

THE general time allowed, according to the present practice, for filing exceptions, *nunc pro tunc*, as of course, is two terms and the following vacation, after the answer is come in: *Thomas v. Llewellyn*, 6 Ves. 823: if it be requisite to take exceptions at a later period, special cause must be shown to obtain the indulgence: *Goodinge v. Woodhams*, 14 Ves. 536: the distinction recognized in the principal case, as to the time for excepting, between bills for relief and bills for discovery merely, was not admitted in *Baring v. Prinsep*, 1 Mad. 527; but, it should seem, the defendant is entitled to his costs when the commission is returned. *Anonymous case*, 8 Ves. 70; *Banbury v. —*, 9 Ves. 103. And it is proper to observe that, by the bill now [1827] pending in Parliament, for the regulation of the practice in the Court of Chancery, it is proposed that, at the expiration of two months from the time of filing any answer, whether filed in term time or vacation, the same shall be deemed to be sufficient, unless exceptions thereto shall have been duly filed; and no exceptions shall be allowed to be filed after that time; unless it shall expire in the interval between the last seal after Trinity Term and the first seal before Michaelmas Term, or in the interval between the last seal after Michaelmas Term and the first seal before Hilary Term, in which cases such time shall extend to and include the day of the general seal then next ensuing. It is farther proposed that, when exceptions are taken to any answer for insufficiency, and the same are not submitted to, unless the plaintiff shall obtain an order for referring such answer for insufficiency within fourteen days from the time of filing such exceptions, the same shall be considered as having been abandoned, and such answer shall, from the expiration of such fourteen days, be deemed sufficient. And when, upon exceptions being taken to an answer, any farther answer or answers to such exceptions shall be put in, such farther answer or answers respectively shall, at the expiration of a fortnight from the time of filing the same, be deemed sufficient, unless the plaintiff shall, in the mean time, have obtained an order for referring the same for insufficiency upon such exceptions; and such order shall specify which of such exceptions are alleged not to be sufficiently answered.

MIDDLEDITCH v. SHARLAND.

[Rolls.—1799, Nov. 30.]

ON suspicious circumstances in the answer a general account was decreed against a steward, notwithstanding a receipt in full; which was allowed only as proof of the particular payment, not of a general release or discharge upon an account stated; though under circumstances it might have that effect; as upon proof, that the principal never would give any vouchers, and an account kept by the steward. (a)

HONOR HARRIS devised all her real estate in fee-simple, and bequeathed her personal estate absolutely at the age of twenty-one, to Anna Maria Middleditch.

(a) The cases allowing inquiry into accounts, where there has been a confidential relationship between the parties, do not extend the doctrine to a settled account between principal and land agent, where there has been an actual accounting, even although there may have been great confidence and trust. *Philips v. Belden*, 2 Edw. 1.

In Michaelmas Term, 1790, Mrs. Middleditch not having then attained the age of twenty-one, a bill was filed in her right by her husband for the purpose of establishing the will; and a cross bill was filed with a view to set it aside on the ground of the insanity of the testatrix. Upon an issue directed a verdict was found in favor of the will; in consequence of which the will was established, and the accounts were directed on the 23d of June, 1792.

Upon the 31st of October, 1792, the bill in this cause was filed by Mr. and Mrs. Middleditch, the latter being then of the age of twenty years and six months, against the executors of the testatrix, and against George Sharland; praying an account of all dealings and transactions between the testatrix and Sharland concerning her estate, particularly of all sums of money received by him from the 1st of May, 1784, from which time he was employed by the testatrix as her steward, to October, 1792, or which might have been received without wilful default, for rents and profits, timber, and fines for renewals of leases, or for cattle, corn, interest of money, or otherwise, and of all moneys paid for her use either in her life or since her decease; and that the Defendant Sharland may deposit all leases, deeds, &c. touching the estate of the testatrix, and all plate, jewels, rings, or other property, possessed by him; and that the executors may join in all necessary acts, &c.

[* 88] * A supplemental bill was afterwards filed; stating, that the Plaintiff Mrs. Middleditch had attained the age of twenty-one, and had obtained administration; the executors having renounced. The bill charged, that the Defendant Sharland had received large sums of money upon all the accounts mentioned in the prayer, to place out at interest: which he had not done; that considerable sums had been lost by suffering the tenants to run in arrear; that a receipt obtained by him on the 24th of February, 1787, was obtained by fraud and imposition, when the testatrix was in a weak state of body and mind; and that the Defendant did not deliver to her at that or any other time any account in writing; that at that time he was indebted to her 3000*l.* and upwards; and at her death 4000*l.* at least was due from him; and he has since received about 4000*l.*

Accounts between solicitor and client, though signed and acknowledged by the client, were decreed (under the circumstances) not to be taken or considered as accounts settled, and an account was ordered: but the Master was directed to consider the accounts and give such weight to them as he should think them reasonably entitled to, in support of any of the items therein contained. *Hickson v. Aylward*, 3 Moll. 1. The Court will not set accounts settled wholly aside except for fraud. *Ibid.* As to other cases of confidence and trust, see *Johnes v. Lloyd*, 10 Price, 62; *Revett v. Harvey*, 1 Sim. & Stu. 502; *Farnam v. Brooks*, 9 Pick. 212; *Pickering v. Pickering*, 2 Beavan, 31; *Graham v. Davidson*, 2 Dev. & Bat. Eq. 155; 1 Story, Eq. Jur. § 462, and note.

Where dealings between principal and agent, which from the connection and other circumstances, were suspicious, and they were yet confirmed by a subsequent deed and other acts of the principal, such confirmation was held a bar to an account. *De Montmorency v. Devereux*, 1 Dru. & Walsh, 119; S. C. on appeal, 2 ib. 410.

As to the effect of a receipt, see Chitty, Cont. (6th Am. ed.) 759.

more; that as her attorney he took upon himself, without any proper authority, to execute leases, particularly one to Daniel Badcock, at an under-value; namely, 115*l.* per annum; though many responsible tenants would have given 200*l.*; and he received premiums for so doing.

The bill also charged and specified various sums as received by the Defendant since the 24th of February, 1737; that his receipts for such sums are ready to be produced, in the whole amounting to 3137*l.*; and that in 1788, and between May 1784 and October 1792, he possessed himself of several deeds, leases, &c. and in her life and since her death, of plate, jewels, &c.

The Defendant by his answer stated, that he was employed by the testatrix as steward at a salary of fifty guineas a year, or at a poundage of 1*s.* in the pound; and he continued to act in that capacity, until she became a lunatic in 1787. During that time he received certain sums for the use of the testatrix; all which sums he regularly accounted for and paid to her, as he received them; as she did not choose to have any open running account kept on foot; and in February, 1787, she gave him the following receipt:

"February the 24th, 1787: I have received of Mr. George Sharland the sum of two hundred and eighty-four pounds at different payments in full of all demands to this day.

"H. HARRIS."

The answer insisted upon the benefit of this receipt in *bar of the account; and stated, that the Defendant [*89] always rendered to her a just and true account of his receipts and payments up to the date of the receipt; subsequent to which he ceased to receive the rents, but employed William Joce to receive them, and received only what was barely sufficient to discharge the household expenses and other incidental charges of the testatrix; and the Defendant also ceased to keep her accounts; she being ill, and frequently disordered in her mind, and continuing so, till she became a lunatic. He denies, that he was indebted to the testatrix in 3000*l.* or any other sum. He admits applications from the Plaintiff to deliver in the accounts of his receipts and payments; with which he was unable to comply; and he submits, he was not bound; because he fully, duly, and punctually, accounted with the testatrix; who being satisfied with his conduct gave him such receipt. Therefore it is not competent to the Plaintiffs to open such account or call upon him respecting the same; as they have not been able to point out any specific error. He denies, that he granted leases of his own authority or cut timber.

By a farther answer the Defendant insisted, that he had duly accounted, and claimed the benefit of the receipt. He set forth the accounts rendered by Joce to him subsequent to the date of the receipt to the death of the testatrix; and since he has not received any sum on her account. For the same reasons he submits he was not compellable to account for the sums paid by him since the 1st of

July, 1784: though he believes, if such accounts were made out, (which from the manner, in which she transacted business, sometimes receiving money herself, or employing servants to do so, and in consequence of no regular account having been kept, it would be impossible to do) it would appear that he has a just demand to a considerable amount upon her estate; as she never paid him any thing whatsoever for his salary. He denies, that he granted any leases, except as after mentioned to Badcock, or received any consideration, &c. He admits it might be true, that after the 24th of February, 1787, he might receive some sums of money, and give receipts: but he cannot set forth the account; as the testatrix would frequently receive rents, and rack-rents, and parts of rents, herself, and never give any acknowledgment; and when he heard of it, or received the remainder, he has at the desire of the tenants

[* 90] *given receipts in his own name for the whole. He denies, that he obtained the receipt by fraud, or, when she was in a weak state, &c. but admits, he did not at that or any other time deliver any regular account in writing; for whenever she executed any leases for lives, it was her custom to make a memorandum of the consideration; and when he received the same, and paid it to her, which he always used immediately, she would look at such memorandum, and make another memorandum of the money she received, of what fines such money was composed; and she keeping such accounts and memorandums never required him, nor was he able, to keep any account of his receipts; as he always paid her immediately upon his receipt. He admits, he signed the lease to Badcock as her attorney, not under any special authority, but as she had agreed to grant him a new lease, and he was apprehensive of losing it, she being then very ill, and having given her express approbation to the Defendant; and afterwards, when she was better, she confirmed it. He denies the charges of undervalue; that he received any thing for granting such lease; that he possessed any leases, deeds, &c. plate, jewels, &c.; and he claims a large balance as due to him for transacting business, and receiving the rents of the testatrix in her life-time.

No evidence was produced on either side.

Mr. *Romilly* and Mr. *Hall*, for the Plaintiffs, observing, that the receipt, upon which the Defendant relied, was not and could not be set up as a release, but as evidence of a stated account, contended upon the answer, and particularly upon the admission, as to the state of the testatrix, that the Defendant must be decreed to account generally according to the prayer of the bill.

Mr. *Short*, for the Defendant, relied on this receipt as in nature of a release; as evidence, that an account was stated, and the balance paid.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This receipt is not sufficient to entitle the Defendant to set it up as an absolute bar of all demands; when I see the answer stating, that she did not choose to have a running account, and the other circum-

stances, and admitting, that she was frequently disordered in her mind; for from the nature of his employment he imposed
upon himself the duty of keeping accounts, not only out [91]
of justice to his employer but to himself. I do not wish to
encourage any gentleman in not keeping any accounts whatsoever.
This Defendant admits, that during the time he did receive certain
sums for the use of the testatrix he regularly accounted for them.
He does not swear he kept no accounts: but he produces none.
By holding this instrument a bar I should establish an extremely bad
precedent. At the same time I do not mean to say, that in no case
whatsoever such an instrument can stand. I know the disadvantage,
under which persons in these circumstances labor in the
Master's office. Suppose, she never would give him a voucher,
how could he prove payment? That perhaps, if he could prove it,
with an account kept by himself, would do. But under the circumstances
disclosed by this answer I do not see such a case set up as
will excuse him as steward for this monstrous negligence in keeping
no account whatsoever. Therefore I am of opinion, that for the
sake of the precedent I am bound to direct an account of all dealings
and transactions between the testatrix and the Defendant Sharland
concerning her estate, &c.; and declare, that the receipt in the
pleadings mentioned is to be conclusive evidence of the payment of
280*l.* but is not to have the effect of a release or discharge to the
Defendant (1).

THAT a steward must always be prepared with regular accounts, see, *ante*, note 1 to *Lord Hardwicke v. Vernon*, 4 V. 411.

(1) *Ante*, *Lord Hardwicke v. Vernon*, vol. iv. 411, and the note, 418.

RODDAM v. HETHERINGTON.

[1799, Nov. 8, 16; Dec. 2.]

AFFIDAVIT to support a writ of *Ne exeat regno* must be positive. (a)
 Writ of *Ne exeat regno*, obtained by a resident here against a resident in the West Indies upon a demand arising there, when the answer came in, was discharged under the circumstances, with costs against the *prochein amy* of the infant Plaintiff: but upon the admissions in the answer the Defendant was ordered to give security to abide the decree, (b), [p. 92.]

MR. PIGGOTT moved before the Master of the Rolls, sitting for the Lord Chancellor, that the writ of *Ne exeat Regno* might issue against the Defendant, to be marked for the sum of 2000*l*.

This application was made upon an affidavit by the Plaintiff, who was of the age of eighteen, stating his title under the wills of his father, who died in 1784, at the age of twenty-two, and his uncle William Adamson, who died in 1772, to their real and personal estates, and particularly to a plantation purchased by Adamson in the island of Tortola; that the Defendant, the executor of [* 92] Adamson, *possessed himself of all his effects, and had the management of the plantation; that he refused to account, though often applied to; that the plantation was negligently and improperly managed by the Defendant; and that divers sums pretended to be paid on account of the testator Adamson were not paid, or were not really due, with other general allegations of improper conduct; that the Plaintiff is informed and believes, that there is due and owing from the Defendant in respect of his receipt of the rents and profits of the the testator's real and personal estates upwards of 2000*l*. and the Defendant intends to go abroad, and there is reason to believe the money will be lost.

THE MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] would not make the order; the affidavit not being positive, but to information and belief only; observing, that it must be as positive as an affidavit to hold to bail; and that this affidavit was defective in other respects, not stating the value of the estate, or what incumbrances were upon it (1):

Upon the 16th of November the motion was repeated before the

(a) See *Sherman v. Sherman*, 3 Bro. C. C. (Am. ed. 1844,) 370, notes (a) and (b); *Flack v. Holme*, 1 Jac. & Walk. 405; *Howden v. Rogers*, 1 Ves. & Bea. 129; *Mattocks v. Tremain*, 3 Johns. Ch. 75; *Rhodes v. Cousins*, 6 Rand. 188; *Gibert v. Coll*, 1 Hopk. 500; *Gernoe v. Bocaline*, 2 Wash. C. C. 130; 1 Barbour, Ch. Pr. b. 3, c. 6, p. 649, 650; *Thorne v. Halsey*, 7 Johns. Ch. 193; 1 Hoff. Ch. Pr. ch. 2, § 8, p. 93-95, and notes; 1 Smith, Ch. Pr. (Am. ed.) 580, *et seq.*

The mere belief of a party as to the balance of account, without disclosing the facts, is generally not sufficient. *Mattocks v. Tremain*, 3 Johns. Ch. 75. But exact precision is not necessary. See *Attorney General v. Mucklow*, 1 Price, Ex. 289. So too in cases of alimony where the amount is not all settled, the writ may yet be awarded. *Denton v. Denton*, 1 Johns. Ch. 364.

(b) See *Atkinson v. Leonard*, 3 Bro. C. C. (Am. ed. 1844,) 223, note (a); 1 Barbour, Ch. Pr. b. 3, ch. 6, § 6, p. 655, 656.

(1) Bea. Ne Ex. Reg. 31, 2.

Lord Chancellor upon a positive affidavit by the Plaintiff, that ever since the death of Adamson the Defendant has been in the constant receipt of the rents and profits of the whole real and personal estate of the testator; and that there is now due and owing to the Plaintiff by and from the Defendant on account of such his receipts of the rents and profits of the said estates real and personal upwards of 2000*l.* of lawful money of Great Britain.

When the first application was made, the bill had not been filed: but the Register said, there were instances of granting the writ previously to the bill filed (1). The bill however was filed previously to the second application; and the Plaintiff offered to take the order upon producing the certificate. The motion was granted.

Upon the 2d of December a motion was made on the part of the Defendant to have the writ superseded, and the recognizance discharged, upon the answer of the Defendant; stating, that he has no papers or documents relating to the affairs of the testator Adamson in England; all his affairs being in Tortola; that he comes occasionally to England every two or three years. The personal estate of the *testator was not sufficient for his debts; [* 93] that it is impossible for him without his papers to give any account of the property, or the debts he paid; that not only the personal, but also the real, estate of the testator was insufficient for his debts; that he had been a tailor, and had purchased one small plantation in Tortola, very ill supplied; that the Defendant let it to two persons successively at a rent of 100*l.* a-year; one of whom ran away; that the estate was sold for 2700*l.* currency, to satisfy the debts of the testator: but, the purchaser not being able to pay all the money, the Defendant himself took the purchase off his hands, and applied all the money to pay the debts; that his reason for taking the estate, though very ill-conditioned, was, that it joined some estates of his own; that he has stocked it with cattle and negroes himself; and that the produce in a good year is twenty hogsheads of sugar, and will this year exceed that quantity.

Mr. *Mansfield* and Mr. *Bell*, in support of the motion. The bill does not state any one sum or demand, that could possibly be in the knowledge of the Plaintiff. It contains no particular charge, but general allegation only. The Plaintiff, having failed in his first attempt upon an affidavit to his information and belief only, not pretending to have any paper or account, now makes this positive affidavit. He could not have been born till many years after the death of the testator. Shall such a positive affidavit be made under such circumstances to detain the Defendant going to Tortola, the usual place of his residence? The Defendant positively swears, that the produce both of the real and personal estates was insufficient for the debts; that therefore nothing can be due to the Plaintiff. The whole of this proceeding also supposes, that that there is no justice

(1) Mr. Beames, Ne Ex. Reg. 26, concludes, that the contrary is now clearly settled.

in Tortola ; that the original devisee, the Plaintiff's father, who lived till 1784, and those, who acted for him, thought this property not worth looking after. I do not object, that Tortola is the usual residence of the Defendant ; as Lord Thurlow in *Atkinson v. Leonard* (1) after a considerable discussion over-ruled that objection : but that application was upon a clear debt by a bond ; which being lost was said to be a debt every where. It must be a very strong case, where the Defendant is not leaving the kingdom to avoid paying his debts, but to go to the very place, where the debt arises ; where it is much more fit the subject should be discussed ; whence

[* 94] every document must be brought over, * which, if the course of justice absolutely requires it, will be very inconvenient. The object is obvious ; that the Defendant being unable to give security may be driven into terms. If the Court thinks it proper, he has no objection to give security to abide the event of the suit : but this is such an attempt as the Court will not tolerate. The writ ought to be discharged, if not at the expense of the Plaintiff, at that of the attorney, who advised him. The only application to the Defendant previous to the issuing of the writ was at Liverpool in August last, by a common friend ; to whom the Defendant explained every thing ; and stated, that his papers were at Tortola. They did not apply afterwards, till he was going on board a ship of his own in the river ; which was obliged to sail without him ; and the packet sails this week.

Mr. Piggott, for the Plaintiff. Neither the Plaintiff nor his father were in Tortola. The Defendant states generally, that he has administered all this property, but under circumstances, that make it impossible this Court should not expect an account, and at least make him give security. Under such circumstances the Plaintiff prefers this Court to that of Tortola. The Defendant is much more able to grapple with the inconvenience he states, than the Plaintiff is to go and contest this with him in Tortola, where the Defendant may have great interest and influence. The circumstances he states may be a reason for his having time given him, but are no reason for dispensing with the account. Where is the principle, that the representative of a person abroad is not to account, because his books and papers are abroad ? The objection as to the Defendant's residence in Tortola might hold, if the Plaintiff lived there, and had come over to this country (2). This property upon the affidavit of the Defendant must be of some value ; and the Court cannot believe it was necessary to sell it. His representation is, that many years after the death of the testator, namely, in 1784, a creditor, whom he does not name, brought an action and compelled a sale according to the law of that country in a short way, by the Provost Marshal ; and the estate sold finds its way to the hands of the Defendant ; and the reason he gives is, that it lay convenient to his estate. This is the

(1) 3 Bro. C. C. 218.

(2) See a case of that sort, *ante*, vol. iv. 590, stated in *De Carriere v. De Calonne*.

case of an executor, who does not pretend, that he ever sent home any account. It is extremely fit, that this family should have an account. If the Court thinks the writ must *be [*95] superseded, there can be no reason, that he should not give security to abide the decree.

Mr. *Mansfield*, in reply. This writ, which is founded upon the prerogative, has from motives of public convenience been extended to private transactions between subject and subject (1): but no rule is more sacred, than that it shall not issue even against a person leaving the kingdom to avoid payment of his debts without a positive affidavit. Though there may be the strongest probability, that there may be something to account for, that has never been made the ground of application. Suppose, no account was settled, and that it commenced at an enormous distance of time, and the transaction must be forgotten. Here instead of a clear positive affidavit of debt, it is made by a man, who can know nothing. His own statement in the bill, that he is only eighteen years of age, shows his affidavit cannot be true within his knowledge, but depends on what he has been told by other persons.

Lord CHANCELLOR [LOUGHBOROUGH]. I do not recollect any instance, where a writ of *Ne exeat regno* has been applied for upon admissions in the answer; but the admission would certainly do as well as an affidavit (2). This answer admits enough to show, that there is a ground for the interference of the Court. I shall relieve the Defendant from the writ. It is very fit to discharge the writ; and, I think, the *prochein amy* ought to pay the costs. The application was very improperly made. Getting this young man to make an affidavit positively, that in conscience he ought not to have made, was a very bad act. But enough appears upon the answer to require me to take security from the Defendant to abide the decree. He has admitted the receipt of assets to the extent of 2700*l.*; but he has not stated what was the extent of that debt, for which the estate was put up to sale.

The order was, that the writ should be discharged; that the *prochein amy* should pay the costs of obtaining the order; and that the Defendant should give security to be approved by the Master in the sum of 1200*l.* to abide the decree (3).

WITH respect to the general doctrine, and practice, as to issuing the prerogative writ of *ne exeat regno*, in civil causes, between private parties, see, *ante*, the notes to *De Carriere v. Calonne*, 4 V. 577.

(1) *Ante*, vol. iv. 590.

(2) *Bea. Ne Ex. Reg.* 32, 3; *post*, *Elches v. Lance*, vol. vii. 417; *Collinson v.* xviii. 353.

(3) See the next case; *ante*, *Coglar v. Coglar*, vol. i. 94, and the note, 95; *De Carriere v. De Calonne*, iv. 577, and the note, 592; and Mr. Beames's Brief View of the Writ of *Ne Exeat Regno*.

RUSSELL v. ASHBY.

BULLER, JUSTICE, *for the LORD CHANCELLOR.*

[1799, Oct. 30; Nov. 11; Dec. 10.]

THE writ of *Ne exeat regno* issued properly; the subject being matter of account. (a) A general affidavit of belief of the Defendant's intention to quit the kingdom is sufficient without the circumstances, upon which that belief is founded. (b)

Upon an application for the writ of *Ne exeat regno* no *subpena* is served: but upon personal service of the writ the party is bound to appear and to put in his answer; and then he may apply to supersede the writ; but not upon his affidavit, (c) [p. 96.]

Analogy between the applications for the writ of *Ne exeat regno* and to a Judge to hold to special bail, [p. 96.]

A MOTION was made for a writ of *Ne exeat regno* upon an affidavit by one of the Plaintiffs stating, that the Plaintiffs, the widow and executors of the testator, being entitled under the will of the testator to the sum of 4000*l.*, a debt due to him, as part of his residuary estate, employed Minchin, an attorney, to get it in; who did accordingly recover a part, amounting to 2712*l.*; which he paid over to the Defendant, a stock-broker, to be invested in the funds; that the books of the bank had been searched; and it appeared, that no such sum had been invested: and that instead of so investing it the Defendant had converted it to his own use; that the Defendant for the purpose and with the view to avoid the payment of the said

(a) See *Matlocks v. Tremain*, 3 Johns. Ch. 75; *ante*, p. 91, note (a), and cases cited; *Sherman v. Sherman*, 3 Bro. C. C. (Am. ed. 1844,) 370, note (b); *Porter v. Spencer*, 2 Johns. Ch. 169-171; *Mitchell v. Bunch*, 2 Paige, 606, 617-619; *Blaydes v. Calvert*, 2 Jac. & Walk. 213; 2 Story, Eq. Jur. § 1471, 1473, 1474.

In case of an account the plaintiff must swear positively to a debt or balance due, but he need swear only to his belief as to the amount. *Thorne v. Halsey*, 7 Johns. Ch. 189; see *Dick v. Swinton*, 1 Ves. & Bea. 371; *Denlon v. Denlon*, 1 Johns. Ch. 441; 1 Smith, Ch. Pr. (Am. ed.) 580, 581; 2 Story, Eq. Jur. § 1471; Cooper, Eq. Pl. ch. 3, p. 149, 150; 2 Madd. Ch. Pr. (4th Am. ed.) 226-229; *Boehm v. Wood*, Turn. & Russ. 344; *Germoe v. Bocaline*, 2 Wash. C. C. 130; *Gibert v. Colt*, 1 Hopk. 500.

The affidavit should state that it appears from the accounts, referring to them with as much particularity as practicable, that so much is due. *Flack v. Holme*, 1 Jac. & Walk. 405; *Matlocks v. Tremain*, 3 Johns. Ch. 75; 1 Barbour, Ch. Pr. b. 3, ch. 6, § 2.

(b) There ought to be a positive affidavit of a threat or purpose to go abroad. *Matlocks v. Tremain*, 3 Johns. 76.

The affidavit should also state that the debt would at least be endangered by the departure of the defendant. *Ib.* See also 1 Smith, Ch. Pr. (Am. ed.) 581, 582; 1 Barbour, Ch. Pr. b. 3, ch. 6, § 2, p. 649, 650; *Sherman v. Sherman*, 3 Bro. C. C. (Am. ed. 1844,) 370, note (b); 1 Hoff. Ch. Pr. ch. 2, § 8, p. 95, 96, and notes.

By the act of Congress, of 2d March, 1793, ch. 22, § 5, it is provided, that "Writs of *Ne Exeat* may be granted by any judge of the Supreme Court of the United States in cases where they may be granted by the Supreme or a Circuit Court. But no writ of *Ne Exeat* shall be granted, unless a suit in Equity be commenced, and satisfactory proof shall be made to the Court or judge granting the same, that the defendant designs quickly to depart from the United States."

(c) See, *post*, 98, note (a).

sum means and intends to quit and leave the kingdom, and remain out of the jurisdiction; and the deponent verily believes he will do so, unless prevented by the authority and process of this Court.

BULLER, Justice, objected, that the affidavit did not state applications to the Defendant to invest the money, and what answers he made; and desired to hear cases.

Mr. Thomson, in support of the motion. Though this writ was formerly very rarely used, and has been refused in some late instances, upon particular grounds, as in *Sedgwick v. Walkins* (1), and in *Ray v. Fenwick* (2) because there was no proper party to sustain the suit, it has now got into general practice; and is adopted upon almost all occasions, where the affidavit positively states a debt; secondly, that it is an equitable demand, upon which the Plaintiff cannot sue at law (3): thirdly, that the Defendant intends to quit the kingdom to avoid payment. In *Atkinson v. Leonard* (4) the writ was granted originally upon an affidavit such as this; though it was afterwards discharged upon the Defendant's giving security. These Plaintiffs are in the first stage, applying for the writ.

* BULLER, Justice. I do not think the affidavit quite so [* 97] satisfactory, as it might have been; but perhaps enough is established to enable me to grant this writ. They ought to state when the money was paid to the Defendant. Suppose, it was only yesterday. Neither are any applications to him stated; nor, upon what ground the Plaintiffs suppose, he means to go out of the kingdom. Unless there is some conversation stated, in which the Defendant himself intimates that design, it can be only surmise or suspicion at most. It is true, these facts are stated very positively; namely, that he has applied the money to his own use: and that he means to go abroad to avoid paying it: but as to the former, it is not said, when he received it, nor whether any applications were made to him, from which the Court can infer that general conclusion you draw; and as to the other, though stated in express terms, it can be only matter of opinion without some such conversation by the Defendant himself (5). I do not think, the Court has gone the length that is supposed, upon these applications. I think, from some conversations I have had, that the Court has been rather rigid upon that ground; and it makes me doubt, whether the principle that has always weighed in my mind, is not the true one; that it ought to proceed by analogy to an application to a Judge of a Court of Common Law to hold a special bail. There the leading circumstance is to see, whether the person is likely to go out of the kingdom to avoid the justice of the Court. If the fact was sworn to at common law, as it is here, I think, the judge would order special bail. If you come to the distinction in *Leonard v. Atkinson*, I very readily agree

(1) 3 Bro. C. C. 11; *ante*, vol. i. 49.

(2) 3 Bro. C. C. 25.

(3) *King v. Smith*, 1 Dick. 82.

(4) 3 Bro. C. C. 218.

(5) See *Collinson v. ———*, *post*, vol. xviii. 353.

with the distinction between letting the writ stand for any limited time, and giving security : but in this stage it is necessary to grant the writ for the purpose of bringing forward the other question. As to letting it stand, or discharging it upon giving security, I cannot do that now ; for, unless the writ issues, the man is gone. Granting the writ, it will be left open to an application to discharge it, giving security : and then it will be exactly the question in a Court of Common Law. I shall therefore grant the writ, marking it for the whole sum, thinking, in all likelihood, the Defendant does mean to go abroad.

[* 98] * On the 11th of November the Defendant was brought up in custody under the writ ; when the Lord Chancellor expressed a doubt, whether the writ could be sustained ; intimating that the Defendant might have been held to bail in an action. (a)

On the 10th of December Mr. Romilly moved to have the writ superseded, with costs, upon the ground of the insufficiency of the affidavit, upon which it was obtained, and also upon an affidavit by the Defendant, made on the ground, that not having been served with a *subpœna* to appear he could not put in his answer. It was admitted however in the course of this application, that he had appeared. The affidavit stated, that the Defendant was totally a stranger to the transaction, upon which the writ issued ; that there never was any sum of 2712*l.* or any other sum belonging to the Plaintiffs deposited with him : that two of the Plaintiffs he had never seen ; that he had seen the Plaintiff Harwood ; but there was no mention of any such sum upon that occasion ; that he has been arrested for 4000*l.* by Minchin ; who has lodged a detainer against him for a farther sum ; and he verily believes, the demand set up by the Plaintiffs is the same, upon which he has been arrested by Minchin ; that he never had any intention to quit the kingdom, or directly or indirectly declared so ; that the arrest was in October, but the Plaintiff in the action has not declared ; nor has the Defendant been served with a *subpœna* to appear in this suit.

Mr. Romilly, in support of the motion. The first ground of this application is, that no fact is stated in the affidavit, upon which this

(a) The Writ of *Ne Exeat* will not in general be granted, except in cases of equitable debts and claims, not recoverable at law. The writ is in the nature of equitable bail. *Atkinson v. Leonard*, 3 Bro. C. C. (Am. ed. 1844,) 223, note (a) ; 2 Story, Eq. Jur. § 1470, *et seq.* ; *Seymour v. Hazard*, 1 Johns. Ch. 1 ; *Jenkins v. Parkinson*, 2 Mylne & Keen, 5 ; *Flack v. Holme*, 1 Jac. & Walk. 405, 413, 414 ; *Smedburg v. Mark*, 6 Johns. Ch. 138 ; *Porter v. Spencer*, 2 Johns. Ch. 169, 170 ; *Mitchell v. Bunch*, 2 Paige, 606 ; *Brown v. Haff*, 5 Paige, 235 ; *De Rivaafnoli v. Corsetti*, 4 Paige, 264 ; *Cox v. Scott*, 5 Har. & John. 384 ; *Palmer v. Doren*, 2 Edw. 425 ; *Gleason v. Bisby*, 1 Clarke, 551 ; 1 Barbour, Ch. Pr. b. 3, c. 6, § 4, p. 652.

The exceptions to the rule, that this writ lies only in case of equitable demands, as stated by Mr. Justice Story, are — 1st, alimony ; 2d, cases of account. 2 Story, Eq. Jur. 1471–1473. See *Atkinson v. Leonard*, 3 Bro. C. C. (Am. ed. 1844,) 223, note (a) ; *Flack v. Holme*, 1 Jac. & Walk. 405, 407, 408. In these two cases Courts of Chancery and of Law have a concurrent jurisdiction. *Atkinson v. Leonard*, *ubi supra* ; *Rhoades v. Crispin*, 6 Rand. 188 ; *Mitchell v. Bunch*, 2 Paige, 606 ; 1 Barbour, Ch. Pr. b. 3, ch. 6, § 4, p. 652 ; *Nixon v. Richardson*, 4 Dessaus. 108.

writ issued, sufficient to sustain it. Upon that affidavit, whatever demand the Plaintiffs have, appears to be a mere legal demand; (a) upon which an action for money had and received would lie: nor does it appear, that there is any ground for the supposition, that the Defendant was about to leave the kingdom. He was a prisoner at the suit of the other Defendant Minchin for the same demand. The affidavit ought to state the ground of the belief; as that the deponent has heard, that he has declared such intention. The Defendant was under the necessity of applying by affidavit; the Plaintiffs not having served him with a *subpœna* to appear.

The *Attorney General*, [Sir John Mitford], in support * of the writ, said, that upon an application for this writ [* 99] the Defendant necessarily is never previously served; but this Defendant being served with the writ has appeared.

LORD CHANCELLOR [LOUGHBOROUGH]. Upon this application no *subpœna* is taken out: but upon personal service of the writ the Defendant is bound to appear. He must come into Court, and appear; for he is to give bail. The requisition is, that he shall give security not to depart the kingdom. Having appeared, he must put in his answer; and may apply to set aside the writ: but I cannot take his affidavit (b) (1).

Upon the Plaintiff's case they would clearly have been non-suited, if they had proceeded at law: and the case must be, that the Defendant shall account for this money according to the price stock bore, when the money was put into his hands. I cannot discharge the order. As to his purpose of going abroad, it can be sworn to only upon belief. It is only swearing to intention. There cannot be a positive affidavit. The deponent might set forth the ground of his belief. A case might happen, in which circumstances might be stated: as if the Defendant had taken his passage, that might be stated as the ground.

No order was made: but Minchin having assigned the bond to the Plaintiffs, and given them a letter of attorney to sue, the writ was on the 28th of February, 1800, discharged; the Defendant consenting not to avail himself of any release from Minchin; and Minchin being restrained from releasing or discontinuing the action (2). Reg. Book, B. 1799, fo. 322.

SEE the reference given in the last note to *Roddam v. Hetherington*, 5 V. 95.

(a) Note (a) last page.

(b) 1 Barbour, Ch. Pr. b. 3, ch. 6, § 5, § 6; 1 Smith, Ch. Pr. (Am. ed.) 580, 581; *Jones v. Alephsin*, 16 Ves. 470.

(c) See, *ante*, 96, note (b).

(1) See *Hyde v. Whitfield*, *post*, vol. xix. 342.

(2) See the preceding case, and the note, p. 95.

LORD PENRRHYN v. HUGHES.

[ROLLS.—1799, Nov. 30; DEC. 3.]

MORTGAGEE, having permitted the tenant for life to run in arrear for the interest, purchases the estate for life; and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under a bill of foreclosure was charged accordingly.

Mortgagee cannot be compelled to take possession; but may foreclose, [p. 106.] The old rule, imposing upon the tenant for life a gross sum, part of the capital of incumbrances, is at an end; but he takes, subject to all the interest, [p. 107.]

MARY PUGH, seised in fee-simple of real estates in the counties of Caernarvon and Anglesea, subject to two mortgages for 1100*l.* and 1000*l.*, by her will, dated the 21st of April, 1781, gave all her capital messuage, called Coytmore, and all other her real estates in the counties of Caernarvon and Anglesea or elsewhere, to [* 100] trustees, their executors, &c. for 1000 years, upon *certain trusts; and, subject thereto, she devised to her daughter Ann Hughes some specific parts of the premises, and other parts to other persons for their lives; and after the expiration of the term and the said estates for life, and subject thereto, she devised the said premises to the use of trustees, their heirs and assigns, upon trust yearly and every year during the life of her son James Coytmore Pugh to receive the rents and profits of the said premises, and to pay and apply the clear money arising from time to time, as the same should be received, to the use and for the benefit of her said son in such manner as they should think proper and necessary; and she declared that her said son should not have any power over the rents and profits during his life, to receive the same or any part thereof, and that he should not have power to sell her said estate or any part thereof for the term of his life or for any other term, and that the same should not be subject to his control, or liable to any debt or debts he had already contracted, or might hereafter contract, and should be subject during her son's life to the control and management of the said trustees, and of no other person or persons whatsoever; and from and after the death of her said son she devised the same to her daughter Ann Hughes for life, with various remainders over in strict settlement.

The mortgage for 1100*l.* to which the devised estates were subject, was a mortgage in fee; which in 1794 was assigned to the Plaintiff. The mortgage for 1000*l.* secured by a term of 500 years was assigned to the Plaintiff in 1793, with 484*l.* an arrear of interest then due upon it.

The trustees never acted under the will.

By indentures of lease and release, dated the 18th and 19th of March, 1795, James Coytmore Pugh, in consideration of the sum of 600*l.* and an annuity of 200*l.* secured to him for his life, sold to the Plaintiff and his heirs all the said premises and the rents and profits

thereof to hold, subject to the incumbrances, to the use of the Plaintiff, his executors and administrators, during the life of James Coytmore Pugh.

Mr. Pugh died three years afterwards.

* The bill was filed for a foreclosure ; and the only ques- [* 101] tion was, whether in taking the account the Plaintiff was to be charged, not only with the interest accrued due after his purchase of the life estate of James Coytmore Pugh, but also with the arrear of interest accrued upon the mortgage for 1000*l.* previously to that purchase : the Defendants insisting, that the surplus rents and profits, received by the Plaintiff after his purchase beyond the current interest of the mortgages, ought to have been applied in discharge of that arrear of interest, which Mr. Pugh, the tenant for life, was bound to keep down.

Mr. *Piggott* and Mr. *Romilly*, for the Plaintiff. This is a new point ; because such an Equity as that set up by the Defendants was never before conceived. It cannot be sustained by the Defendants upon the ground, on which it is put in the answer ; namely, the manner, in which the estate was devised to Mr. Pugh. That cannot affect the question ; which is only, whether a person, who purchases from the tenant for life, is bound to discharge the interest accrued in the time of that tenant for life. Perhaps the personal representatives of Mr. Pugh might on the restriction in the will say, he ought not to have sold : but these Defendants entitled under the will to the estates in remainder, having no relation to him, no interest to say, he should not sell, cannot raise that objection. The testatrix has anxiously provided, that the estate shall not be liable to the debts of her son : but they are now endeavoring so to charge it. I admit, the Plaintiff must be considered as having notice : but except in that respect, that being apprised of the arrear of interest, he is in the situation of a purchaser with notice, there is no difference between the case of the mortgagee purchasing and that of a stranger. It cannot be contended, that the arrear was part of the price of the purchase.

If the Plaintiff was bound to make this application, it must be upon the ground of some lien. A mortgagor has a lien upon the rents and profits undoubtedly for the interest accrued ; because he has a lien upon the whole estate and all the rents and profits : but that would be only as between the mortgagee and the tenant for life, not as between the tenant for life and those in remainder. It is true, an application might have been made for a receiver ; and then the rents and profits would be applicable not only to the interest * but also to the principal : but the persons en- [* 102] titled in remainder took no step to make the tenant for life pay the arrears. It was a personal debt from him : but how is it a specific lien upon the future rents and profits ?

Mr. *Richards* and Mr. *W. Agar*, for the Defendants. This Equity, however new, is perfectly plain, and very similar to that, which has prevailed upon the question, how far the remainder shall

be charged with any interest accrued in the time of the tenant for life; as in *Tracy v. Lady Hereford* (1), and *Revel v. Watkinson* (2). The tenant for life, subject to a mortgage, is bound to keep down the interest, not only personally, but the remainder-man has a right to file a bill; and if the mortgagee does not take possession himself, the Court will appoint a receiver, and direct him not only to keep down the future arrears, but to pay the foregoing arrears. It is not necessary for the remainder-man to wait till the death of the tenant for life, and then come upon his assets, but in truth it is a charge upon the estate: otherwise the Court could not appoint a receiver. There is therefore a lien upon the property as between the tenant for life and the remainder-man. The estate in the hands of the tenant for life is liable to the arrears as well as the future payments. The tenant for life cannot put any person who has notice, in a better situation than his own. Having notice of the Equity, to which the estate is subject, which it is admitted he must have, being himself the mortgagee, to whom the arrear was due, he purchases subject to it. The contract does not import, that he did not mean to purchase subject to this Equity. There might be a hard case of that nature. But this Plaintiff was perfectly aware of the arrear. Upon the face of the instrument the title the Plaintiff intended to purchase appears. The tenant for life, subject to incumbrances, the past interest not paid, and future interest to be paid, agrees to convey his right and title, and only that, to the Plaintiff; and that is what he expressly agrees to buy. He bought, subject to the Equity, and with direct notice of it; knowing the arrear was due. Could Pugh having this, subject to the arrear, convey except subject to the same Equity? Would not the Court have called upon him to keep down the arrear of interest? The rule, that prevailed in *Tracy v.*

Lady Hereford, that no arrear shall accrue to charge the remainder-man, if the rents *and profits are sufficient, is clearly the rule of the Court; and has been acted upon in a recent case, *Shipbrook v. Hinchinbrook*, and in other cases; and the Defendants only are in a situation to complain; for the question is, with what the remainder shall be charged; which was precisely the question in the two cases referred to.

Mr. Piggott, in reply. If the Defendants, having done no act to compel the tenant for life to fulfil his obligation, can now after his death succeed in raising this Equity, the rights of mortgagees will be affected. The right of the remainder-man, while the tenant for life is in possession, to call upon him to fulfil his obligation of keeping down the interest is admitted; also, that, as the premises are charged to the mortgagee with all principal and all interest, if they catch the tenant for life in possession, this Court will act to compel him to exonerate the remainder-man from the arrear, which he has suffered to accrue. But these Defendants have lain by during his whole life,

(1) 2 Bro. C. C. 128.

(2) 1 Ves. 93.

suffering him, the trustees not acting, during fourteen years to spend the whole rents and profits; and if the purchase had not taken place, it would have gone on to his death. The Defendants are in a better condition from the purchase; for the Plaintiff agrees, his interest must stop from the time he got into possession. The fallacy is in applying to this case the right of the remainder-man, applying, while the tenant for life is in possession, and calling upon the tenant for life to do his duty. This is calling upon the Court to make an *ex post facto* application of the rents and profits, which during the life of the tenant for life they permitted to remain without application. If the remainder-man does not make the application, and catch the rents and profits in the possession of the tenant for life, while they are accruing, he cannot come afterwards and claim to this extent. I agree, they have full right to the benefit of the argument of notice, that the interest was in arrear. Even after the purchase the remainder-man might have interposed and applied to the Court. They could undoubtedly have filed a bill against the Plaintiff and Pugh. Suppose, instead of the purchase a new debt had been contracted by the grant of an annuity to the Plaintiff by Pugh, and in that way he had applied the rents and profits: could they in that case call them back? If the Plaintiff had lent money upon a mortgage of the life estate; and that money had been paid, the remainder-man *lying by, could it be called back upon the [* 104] ground, that the creditor knew the interest was in arrear?

Where is the difference? A mortgagee has no lien upon rents and profits, that are spent. From the time that he acts, bringing an ejectment, or getting a foreclosure, he has a lien upon them: but till then he, who receives, may spend them, as he pleases; and they cannot be called back. The remainder-man not calling upon the tenant for life suffers for his neglect. He must still pay the mortgagee; and it is his interest to interpose.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Suppose, the Plaintiff had taken possession as mortgagee: would the Court have endured, that he should not have paid himself the arrear? The Master would have charged him with every shilling. He must have applied the rents and profits to all the arrears, as well as the accruing interest. They are applicable to the principal and the interest due and coming due; going in diminution of all, that is due to him; and the tenant for life cannot object; though all his rents and profits are taken from him.

Is not the mortgagee a little to blame in point of Equity? He knows, those rents and profits are not applicable by the tenant for life to his own pocket. He knows, he has a remedy; and though a mortgagee is not bound to take possession, because it is putting himself in the character of a bailiff, he ought to take possession for the purpose of paying himself his interest. But he chooses voluntarily to take possession as a purchaser rather than by the paramount and better title, as mortgagee. If he had taken possession as mortgagee, it would have been of course to have set off against the principal

and the interest accrued all the rents and profits received by him as mortgagee. Will his not taking possession as mortgagee make any difference? It must be contended by the Plaintiff, that if he had taken possession as mortgagee, he might have paid himself the accruing interest, and have paid all the rest over to the tenant for life. I am strongly inclined against the Plaintiff at present, but will consider of it.

Dec. 3d. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. When this case was argued, it was not from any doubt, that I entertained upon the point, that I reserved the directions, but for the purpose of looking into the case of *Tracy v. Lady Hereford*, with a note of which I have been favored by *Mr. Richards, and which is reported in Brown; to see, whether from that case it would be necessary to give a direction, that the arrear of interest accrued prior to the sale of the life-estate to the Plaintiff ought to be included in the account against him; and upon looking into that case I feel myself fully warranted in declaring, that all the arrears accrued as well previously to as during the estate of the Plaintiff, supposing it to be a life-estate in Pugh, are chargeable upon that life estate.

The testatrix devises these estates beneficially to her son for life, but under very special circumstances; the trustees being to receive the rents and profits, and apply them for his benefit, and, as appears to me, according to their discretion. It now turns out, that they never acted, but permitted him to receive the rents and profits. I shall therefore in the decision consider him as actual tenant for life; for in the view I have of the case it will make no difference whatsoever in the directions to be given. He being certainly bound to keep down the interest (1), as between him and the reversioner, permits an arrear to accrue; and makes a bargain with the Plaintiff, by which he was admitted into possession, not as mortgagee, to which he had certainly a right, if he chose to enforce his mortgage and take possession, but as a purchaser of the life interest of Pugh; and he continues in possession of it till Pugh's death, about three years afterwards (a). Upon his death the Plaintiff files the bill for a foreclosure; and this point has been raised, upon which it is desired, that some direction may be given, whether in the account of the rent and profits he is to be charged, as having applied all the rents and profits during his possession to the reduction, not only of the interest accrued during his possession, but of any interest, that had accrued previously.

It was contended for the mortgagee, that though he took possession, not as a mortgagee but as assignee of the life interest, he was only bound to apply the rents and profits during his possession to the interest, that did accrue during his possession upon these prior

(1) *Burges v. Maubey*, 1 Turn. 167.

(a) As to the effect of laches or unfairness on the part of the incumbrancer, see *Tracy v. Hereford*, 2 Bro. C. C. (Am. ed. 1844,) 139, note (c); *Loftus v. Smith*, 2 Scho. & Lef. 642.

incumbrances. Consider, what his situation would have been, if no bargain had been made, but he had put his mortgage in force, and had taken possession as mortgagee. Nothing is more clear, than that he would have been obliged to apply all the rents and profits to the reduction, not only of the interest, that * might [* 106] accrue during that possession, but of any that might have accrued previously; for the right of the reversioners is this. The tenant for life is bound to keep down the interest accruing upon the incumbrances affecting his estate, prior to his life interest. It is true, a mortgagee cannot be compelled to take possession; for he would subject himself to the account; which this Court will never force upon a mortgagee. Therefore he may file a bill for a foreclosure without taking possession. But if he does take possession, he is bound to apply all the rents and profits, as this Court would distribute them among the several persons claiming interests, subject to his mortgage. A reason was suggested for his taking possession as purchaser, and not as mortgagee, which is immaterial; for, whatever reason he had, he elected to take possession as assignee of the tenant for life. The question then is, whether he could put himself as such in a better situation than the tenant for life. Nothing is more clear, than that if the tenant for life had continued in possession, and not applied the rents and profits in reduction of the mortgage, though as between the mortgage and the estate the mortgagee would have a right to be paid out of the estate, into whosoever hands it might come, yet the reversioner might file a bill to make the rents *amenable*, and compel the tenant for life to answer for what had accrued. The Plaintiff's possession as assignee makes no difference. Every remedy they had against Pugh they have against any one claiming under him with notice of the charge; and there is no doubt the Plaintiff had notice. He is the mortgagee; and the deeds expressly state the incumbrances. It is clear, therefore, this transaction cannot vary the rights of the reversioners as to the application of the rents and profits to the arrear of interest. His possession might prevent them from doing that, which it is otherwise competent to them to do, namely, to sequester the rents and profits during Pugh's life, not only for the arrear to accrue, but for any, that had accrued.

I had no doubt, notwithstanding the arguments for the Plaintiff. But *Tracy v. Lady Hereford* was quoted: and I wished to look into that case upon this point; and I am clearly of opinion, that upon the doctrine there laid down, first by Lord Kenyon, then sitting here, and afterwards upon an appeal by Lord Thurlow, however hard it may be, which it was in that case, for Lady Hereford lost all her life interest, it is perfectly established, that the * rents and profits during the estate for life must be ap- [* 107] plied to the reduction of any interest accrued prior as well as subsequent to the commencement of that estate; and I am perfectly satisfied upon that authority, that I am bound to declare, all the rents and profits accrued during the possession of the Plain-

tiff ought to be applied to keeping down the interest, not only that might accrue during that possession, but all, that had accrued previously. The ground is, that the estate in the hands of the tenant for life is liable to incumbrances, is in the first place amenable, and may be made so by an application by the reversioners, to all the interest accrued upon incumbrances prior to that estate for life (a). It is very hard, I admit. He may lose all his interest. But it must always be remembered, that both the tenant for life and the incumbrancers have a right to have the estate sold; and if so, then the tenant for life will have his interest in what remains of the money produced by the sale: and it will be divided, as the law provides, in the proportions their interests bear to the estate. It was argued in that case, that formerly the Court made a particular arrangement between the tenant for life and the reversioners, and threw a particular burthen upon the tenant for life. That rule, calling upon him to pay a gross sum, I take it, is all now completely put an end to (1) (b). It necessarily follows, that he must take, subject to all the interest, that could have accrued prior to his estate; and the Court is driven to the necessity of adopting the one rule or the other. If the tenant for life sits by, and sees interest accruing, it is his own fault. He or the incumbrancers might apply to the Court; and then the estate would be sold; and what remains after discharging the incumbrances would be put out at interest, and he would have the interest (c). If this had been a bill not for a foreclosure, but by the reversioners, and the tenant for life had made the point, I must perhaps have decided as to the costs: but in this case it has made no more expense.

Therefore I am clearly of opinion, that I can only make the common decree upon a foreclosure, namely, an account of the principal, interest and costs, and an account of the rents and profits received by the Plaintiff, when in possession under this deed, &c. with this only addition, that the rents and profits so received by
 [* 108] * him are to be applied in the first place to the payment of the interest accrued due subsequent to the 19th of March, 1795, the day when he took possession, and, so far as they will extend, to any interest, that might have accrued prior to that day.

1. A FIRST mortgagee, in possession, may apply the surplus rents, after payment of the interest due to him, in discharge of the principal debt; and perhaps, before he received notice not to do so, he might be justified in handing over such

(a) See 1 Story, Eq. Jur. § 488; Ram on Assets, ch. 6, § 10, p. 117.

(1) See *White v. White*, ante, vol. iv. 24; and the note, 33; v. 554; ix. 554; where the rule, imposing one third of the fine for renewal of a lease upon the tenant for life, is considered as unreasonable and exploded.

(b) See 1 Story, Eq. Jur. § 487; *Warley v. Warley*, 1 Bai. Eq. 398; *Pickering v. Fowles*, 1 Bro. C. C. (Am. ed. 1844,) 199, note (4); *Nightingale v. Lawson*, 1 ib. 444, note (c); *Gibson v. Crehore*, 5 Pick. 146; *Suaine v. Perine*, 5 Johns. Ch. 482.

(c) 1 Story, Eq. Jur. § 487; *Foster v. Hilliard*, 1 Story, 77; *Houghton v. Hapgood*, 13 Pick. 154; *Warley v. Warley*, 1 Bai. Eq. 398.

surplus to the mortgagor; but clearly, he has no right to do this after notice of the demands of a second mortgagee. *Dalmer v. Dashwood*, 2 Cox, 382; *Maddocks v. Wren*, 2 Cha. Rep. 209. *A fortiori*, this would be quite inadmissible, if the notice were given by a prior mortgagee. *Archdeacon v. Bowes*, 1 M'Clel. 165. Where, however, a second mortgagee has been so imprudent as not to give notice of his incumbrance, the mortgagee in possession may (as was intimated above) pay over the surplus rents to the mortgagor; and as the second mortgagee could not have an account of the by-gone rents from the mortgagor, so, he cannot have it from the other mortgagee. *Berney v. Sewell*, 1 Jac. & Walk. 650.

2. Generally speaking, it is perfectly clear, that the tenant for life is bound to keep down the interest of incumbrances. *Burgess v. Maubey*, Turn. 174; *Bertie v. Lord Abingdon*, 3 Meriv. 566.

3. As to the rate according to which a tenant for life is to contribute towards the discharge of incumbrances; see, *ante*, the note to *White v. White*, 4 V. 24.

4. With respect to the peculiar relation between mortgagor and mortgagee; see the note to *Colman v. The Duke of St. Albans*, 3 V. 25.

5. If a mortgagee, after recovering in ejectment, collusively decline taking possession of the mortgaged estate, he will be charged with the rents he might have received; *Duke of Buckingham v. Gayner*, 1 Vern. 258; *Chapman v. Turner*, 1 Vern. 267; as he will also, at the suit of other creditors, when, after entry, he has allowed the mortgagor to continue in receipt of the whole profits; *Coppring v. Cooke*, 1 Vern. 270; *Maddocks v. Wren*, 2 Cha. Rep. 209; or, at least, if not charged with the whole rents, he will be deprived of his right to charge interest, for that period, against the estate, so as to delay a subsequent mortgagee. *Bentham v. Haincourt*, Prec. in Cha. 30; *Loftus v. Swift*, 2 Sch. & Lef. 656.

JAMES v. KYNNIER.

[1799, DEC. 5.]

EQUITABLE set-off upon mutual credit; though no mutual debts, upon which a set-off could be sustained at law. (a)

IN 1789 Rice James and Richard Beckford, carrying on business in partnership in London as merchants, borrowed 19,000*l.* on their joint and several bonds; and for farther security assigned a mort-

(a) In general the doctrine of set-off is the same in Equity as at law. *Jackson v. Robinson*, 3 Mason, 138; *French v. Garner*, 7 Porter, 549; *Gordon v. Lewis*, 2 Sumner, 143, 628; *Howe v. Sheppard*, 2 Sumner, 409; *Gass v. Stinson*, 3 Sumner, 99; *Duncan v. Lyon*, 3 Johns. Ch. 351; *Livingston v. Livingston*, 4 Johns. Ch. 292; unless there is some equity attaching to the particular transactions between the parties, as where there are mutual credits between the parties or an existing debt on one side, which constitutes the ground of credit on the other. *Howe v. Sheppard*, 2 Sumner, 409; *Gordon v. Lewis*, *ubi supra*. See also *Green v. Darling*, 5 Mason, 208, 213; *Duncan v. Lyon*, 3 Johns. Ch. 358, 359; *Dale v. Cook*, 4 Johns. Ch. 11, 14.

The mere existence of cross-demands is not sufficient to raise a case of equitable set-off. It exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. *Ransom v. Samuel*, 1 Craig & Phil. 154.

The debts must be mutual, that is, they must be due to and from the same person in the same capacity, to authorize a set-off. *Duncan v. Lyon*, *supra*; *Livingston v. Livingston*, *supra*; *Dale v. Cook*, *supra*; *Murray v. Tolland*, 3 Johns. Ch. 574; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *Howe v. Sheppard*, *supra*; *Gale v. Luttrell*, 1 Young & Jerv. 180.

gage upon an estate in Jamaica for 45,000*l.* Of the money borrowed 2500*l.* was advanced by the house of Hutchinson, Robert, and William Mure.

In May 1793 an agreement was entered into for the sale of James's interest in the partnership to James English Keighley for 30,500*l.*, payable by instalments. This agreement, though consented to at a meeting of the creditors, was not completed till 1797; when the deeds were executed, and the bonds of Beckford and Keighley were exchanged for those of James and Beckford, except the bond for the debt of 2500*l.* to the Mures; but the money was deposited by Keighley at a banker's. In October 1793 the Mures applying for payment of their bond, Beckford said, it was not then convenient; upon which they requested, that they might be accommodated with such sum of 2500*l.* as a loan, to be repaid at a future period. Keighley offered to lend part of the money deposited by him in pursuance of the agreement for the purchase of James's share in the partnership, if James would consent. Robert Mure accordingly upon the 21st of October wrote to James; stating their want of money, the application to Beckford to relieve them "by an application to Mr. Keighley to take up your debt to us secured upon William Beckford's estate either wholly or to accommodate us with the amount upon our engaging to repay it at a future period: this latter mode Beckford told me would be most agreeable to him; and that he would mention it to Keighley."

The letter proceeded to state, that Keighley had no other money disengaged but what is lying at the banker's to be paid to [*109] James *upon the signature of the deeds; but professes himself ready to accommodate them, provided James will give his consent to his appropriating so much of the money to that purpose.

Upon this letter James came to London, and received from Keighley, 2500*l.*; which he immediately, upon the 24th of October, 1793, delivered to the Mures; and he received from them a promissory note for that amount, payable to him three months after date. Upon the 31st of December, 1793, the Mures became bankrupts. Since 1793 the interest upon the debt to the Mures was paid up to 1797 by Beckford and Keighley, or by Keighley after the death of Beckford.

Joint and separate debts cannot be set off against each other in Equity any more than at law, unless there be some other equitable circumstances. *Jackson v. Robinson*, 3 Mason, 138; 2 Story, Eq. Jur. § 1437, and cases cited in note (3); *Tucker v. Ozley*, 5 Cranch, 34. Special circumstances may arise to authorize a set-off even in such a case. 2 Story, Eq. Jur. § 1437.

An unliquidated account cannot be set off in Equity, but the Court will sometimes defer a decree, to enable the party to have the account liquidated. *Nims v. Rood*, 11 Vermont, 96.

Uncertain damages arising from tort or breach of covenant are not the subjects of Equitable set-off. *Duncan v. Lyon*, *supra*; *Murray v. Tolland*, 3 Johns. Ch. 575.

For a more full account of this matter of Equitable set-off, see 2 Story, Eq. Jur. ch. 38, § 1430-1444. See also Chitty, Cont. (6th Am. ed.) 840, *et seq.*

The bill was filed by James ; praying, that it may be declared, that the sum of 2500*l.*, paid by the Plaintiff to the Mures, was a payment or part-payment of the debt then owing to them from the Plaintiff and Beckford ; or that the Plaintiff is entitled to have such payment set off against such debt ; that an account may be taken of what remains due after allowing such payment or set-off ; and that upon payment of the balance by the Plaintiff the assignees of the Mures may be decreed to deliver up the bond, and to assign their interest in the mortgage to the Plaintiff.

The bill stated, that as there remained an unsettled account respecting the interest of the said debt of 2500*l.* no final discharge was given to the Plaintiff upon his paying over the money to the Mures ; and therefore by way of acknowledgment for the receipt of that sum he received their promissory note ; by means whereof the principal debt was paid off ; and nothing remained owing in respect of the said debt except some small sum for interest at that time owing.

The Defendants, the assignees, by their answer stated, that they believe the Mures at the time of the application to Beckford intended, that the money, which should be advanced in consequence, should be in discharge of the debt due to them ; but that the Plaintiff advanced the same as a distinct loan from himself to them, and took a note accordingly ; and for that reason, not for that in the bill mentioned, no final discharge was given upon that occasion for the debt of 2500*l.* due from Beckford and James ; and that ever since May, 1793, Keighley has not only been understood *to be the [*110] debtor instead of the Plaintiff to all the creditors of the house, but has actually been in possession jointly with Beckford of the effects of the partnership.

The Defendants therefore insisted, that the Plaintiff ought not to be considered as interested in the said debt of 2500*l.* as surviving partner of Beckford ; and as assignees of the Mures they claim the whole debt ; contending that the advancement of that money to the bankrupts was no payment or part-payment of the debt ; and the Plaintiff is entitled only to prove that sum under the Commission.

The book-keeper of the partnership by his depositions stated, that the bond of the Mures had not been exchanged, because Keighley did not know, who had a right to it. He also stated, that the instalments of the purchase-money for the sale of the Plaintiff's share were paid by Beckford and Keighley out of the funds arising from the property of the late house of Beckford and James and moneys provided by Keighley.

The *Attorney General* [Sir John Mitford], Mr. Mansfield, and Mr. Steele, for the Plaintiff, after mentioning *Ex parte Quintin* (1), *French v. Fenn* (2), *Ex parte Prescott* (3), and Lord Kenyon's opin-

(1) *Ante*, vol. iii. 248, since over-ruled. See the note vol. iii. 248.

(2) 1 Cooke's Bank. Law, 569 ; 8th edit. 565.

(3) 1 Atk. 231.

BISHOP OF WINCHESTER v. BEAVOR.

[1799, Dec. 6.]

To obtain an order for taking the bill *pro confesso* under the statute 5 Geo. II. c. 25, the affidavit must state, that the Defendant has been in England within two years before the *subpœna*. (a)

MR. COX, for the Plaintiff, moved for an order to have the bill taken *pro confesso* under the Statute (1).

The affidavit in support of the motion stated positively, according to the practice, as settled by the Master of the Rolls upon the late motion in *Neale v. Norris* (2), that the Defendant had been in the kingdom within two years before the *subpœna* issued (3).

Ordered.

As to the course to be pursued, in order to have a bill taken *pro confesso*; see, *ante*, the note to *The Attorney General v. Young*, 3 V. 209.

MARQUIS OF LoTHIAN v. GARFORTH.

[1799, Dec. 6.]

SERVICE of an order of sequestration, *nisi*, upon the Clerk in Court good; the Plaintiff having tried in vain to serve it personally. (b)

MR. ALEXANDER, for the Plaintiff, moved that service of an order for a sequestration, *nisi*, upon the Defendant's Clerk in Court may be deemed good service, upon an affidavit stating, that the Plaintiff had tried to serve him personally and could not, and an affidavit of service of notice of the motion.

The order was made.

WHEN merely an order *nisi* for a sequestration has been made, service on the defendant's Clerk in Court is sufficient, the *absolute* order requires personal service. *Smallbrooke v. Lord Donegal*, 3 Anstr. 647.

(a) As to the practice under this head, see note (a) to *Neale v. Norris*, *ante*, 1.

(1) 5 Geo. II. c. 25, s. 8.

(2) *Ante*, p. 1.

(3) The final order for taking the bill *pro confesso* may be had on motion, where there is but one defendant; if there are more, the cause must be set down. *Seagrave v. Edwards*, *ante*, vol. iii. 372.

(b) See 1 Smith, Ch. Pr. (Am. ed.) 446; 2 Madd. Ch. Pr. (4th Am. ed.) 205, 206.

THE KING v. BLATCH.

[1799, Dec. 7.]

EXECUTRIX, in custody under a writ *de excommunicato capiendo* for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds: motion refused.

A MOTION was made to supersede a writ *de excommunicato capiendo*, issued against Mary Blatch, as executrix of her husband James Blatch, upon an affidavit, stating the following circumstances.

In 1795 James Cary being indebted to Thomas Macknab to the amount of 594*l.* 1*s.*, being the arrears of an annuity, paid 100*l.*; and he, and James Blatch as surety, gave their joint and several bonds in the penalty of 1000*l.* for payment of the remainder by instalments. Some instalments having been paid, and others becoming due, amounting, together with the balance of one instalment, that had been paid in part, to 175*l.* 12*s.* 6*d.*, Macknab brought an action in the Court of King's Bench against Cary, and another *action in the Court of Common Pleas against Mary [*114] Blatch, as executrix of her deceased husband. Pending those actions an agreement took place between Cary and Macknab, that the latter should discontinue all proceedings in both actions upon Cary's paying him the sum of 50*l.* in part discharge of the debt upon the bond, with all costs, and giving him a warrant of attorney to secure 125*l.* 12*s.* 6*d.*, the remainder of the debt, with interest, upon the 26th of November next. The 50*l.* was paid, and the warrant given. This agreement was wholly without the privity of Mary Blatch; who was totally ignorant of it, till after it was concluded; when Cary informed her of it.

Upon the 5th of May, 1798, a citation of Mary Blatch issued at the instance of Macknab, alleging himself to be a creditor by bond of James Blatch, calling upon her to bring in an inventory of the personal estate of her husband. No farther proceedings were had upon that citation; which was discontinued in consequence of the compromise. In December 1798 judgment was entered up against Cary for 251*l.* 5*s.* In Hilary Term last another action upon the bond was brought against Mary Blatch in the Court of Common Pleas for 126*l.* 5*s.* Afterwards a fresh citation issued against her in the Ecclesiastical Court for the same purpose and upon the same ground as the former; and upon that she was excommunicated for not putting in an inventory; and she was in custody under the writ; which issued in Michaelmas Term, 1799.

Macknab by his affidavit stated, as to the agreement to discontinue the action against Mary Blatch, that Cary had given his warrant of attorney as a collateral security for the sum of 125*l.* 12*s.* 6*d.*, with interest upon the 26th of November; and that not being paid, he commenced another action against her; and on her pleading *plene administravit* he caused the citation to issue.

Mr. *Wetherell*, in support of the motion. The jurisdiction cannot be disputed. The Statute of Elizabeth (1) directs, that the writ shall be returnable in the Court of King's Bench in the Term next after the *teste*. Till then that Court can have no cognizance.

The jurisdiction of this Court therefore remains till the [* 115] return of *the writ. That point was admitted by Lord Macclesfield in *Rex v. Burrard* (2), and adjudged by Lord King in *Barlow v. Collins* (3).

The ground of this application is, that this is in Equity, under the circumstances a release of the surety; and then this bond, upon which the citation was instituted in the Commons, is a bond, upon which no debt is due from the surety, though it may be due from the original debtor. The subject of the discharge of a surety in such cases was very much discussed by your Lordship in *Rees v. Berrington* (4). The only difference is, that in that case the surety had once money in his hands, out of which he might have reimbursed himself: but your Lordship disclaimed that, as forming any part of the ground of your decision; and principally relied on *Nisbet v. Smith* (5). That case in the circumstance of taking judgment with stay of execution precisely corresponds with this. The Equity therefore is clear, upon the ground stated by your Lordship, that to the new action, though without doubt there was a discharge in Equity, she could not plead that.

It is true as a general proposition, that wherever a personal representative is cited in the Ecclesiastical Court by a person, who is not a creditor, any superior Court having a right to grant a prohibition or to relieve the party will never allow a person assuming the character of creditor to go to execution, or permit such a proceeding to stand; especially upon a transaction of this nature. In *Oughton* (6) there is an apology for the practice of the Ecclesiastical Court in the facility of these proceedings. If the person cited says, there is no such bond, it is produced. If he says, it is not a fair bond, then after the form of proving the signature and attestation there is an end of the question; and there is no opportunity of trying, whether it was not paid, released, &c. In the case of a creditor by simple contract it is sufficient, that the entry of a merchant in his own book is produced; "*& hæc probatio sufficit ad probandum interesse allegatum.*" It is therefore the more essentially necessary upon an application to this Court, exercising a visitatorial control, that the question should be discussed: otherwise the party may be excommunicated by a person, who is no creditor.

[* 116] *Lord CHANCELLOR [LOUGHBOROUGH]. Why did she not appear to the citation? The application to me is

(1) 5 Eliz. c. 23, s. 2.

(2) 1 P. Wms. 435.

(3) 1 P. Wms. 436, n.

(4) *Ante*, vol. ii. 540.

(5) 2 Bro. C. C. 579.

(6) Tit. 230, page 340.

totally destructive of the jurisdiction of the Ecclesiastical Court to call upon a representative to give an account of assets. If she does not appear, how is it possible to come here, and desire, that the suit may stop, and that I shall supersede all process?

For the motion. Upon this ground, the ground of all prohibitions, that the party is no creditor; therefore it is out of the jurisdiction of the Ecclesiastical Court; which is satisfied by the production of the instrument, and does not allow the question to be tried; though in another Court it may be proved, that there is no debt. The ground of all prohibitions is tried by affidavit; and the fact is always in the first instance so stated. Then if the Court is not satisfied, they put the party to declare in prohibition. If this executrix had applied earlier, namely, for a prohibition, upon the facts I have stated it would have been granted.

LORD CHANCELLOR. Is there any instance of such a prohibition? When the writ of prohibition has issued, if the ground of prohibition fails, the cause is sent back: but here you impeach the jurisdiction. I am stopping process upon it. She has never appeared. If she had appeared, and objected to the interest of this pursuer in the Ecclesiastical Court, possibly upon that there might have been a ground of prohibition.

The *Attorney General* [Sir John Mitford], against the motion. The Court cannot possibly do this, if there are any merits. An application for a *supersedeas* must be upon the ground, that the writ has issued improvidently. It issues upon the *significavit*. It is not stated, that the Court has done wrong in issuing that; and if that is correct, there is a clear right to the writ. The ground of this application is, that there is an equitable ground to destroy the debt. The quotation from Oughton proves, that it would be improper to try that question in the Ecclesiastical Court; stating, that they are not to try the validity of the debt, but whether there is *prima facie* a sufficient ground for an inventory. This executrix must have had notice, that the action was discontinued. It is very strong to call the agreement an abandonment of the right to proceed against her. Instead of filing a bill to stay proceedings in the action brought in *Hilary Term last upon the bond, she pleads [*117] *plene administravit*. The Plaintiff then had no means of proceeding but by citing her for an inventory. He proceeds to excommunication; and then this application is made. If it succeeds, your Lordship will have to try the debt in every such case.

LORD CHANCELLOR. The application goes totally to destroy the jurisdiction of the Ecclesiastical Court. By parity of reason they might apply to me to stop an action on a bond. I cannot possibly supersede the writ. It follows of course upon the *significavit* (1).

THE old writ *de excommunicato capiendo* is by the statute 55 Geo. III. c. 127, discontinued, and the writ *de contumace capiendo*, substituted.

(1) No prohibition before appearance. *Transer v. Watson*, 1 Salk. 35.

O'CALLAGHAN v. COOPER.

[1799, Dec. 5, 7.]

TRUST term by will to raise out of real estate portions for daughters, to be paid on marriage, upon condition, that they should be married with consent of their mother (a), or, after her death, of the trustees, and that the husband should previously make a settlement: the residue of the personal estate, subject to debts and legacies, to be applied in discharging the portions in ease of the real estate or for any purpose the trustees might judge most beneficial for the devisee. A marriage having taken place with the consent of the mother and the privity of the trustee, but without any settlement by the neglect of the trustee, the husband having before and after the marriage offered all, that was required of him, and been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon executing the settlement. (b)

No costs to a trustee, whose neglect occasioned the suit, (c) [p. 118.]

CALEB LOMAX, by his will, dated the 20th July, 1786, devised all his real estate, not before disposed of, to William Thrale, John Cooper, and William Lawrence, their executors, &c. for a term of 500 years, and, subject thereto, to them and their heirs, to the use of them and their heirs, until his youngest son Joshua Lomax should attain the age of twenty-five, or should die, which should first happen; and from and immediately after his attainment of that age or his decease, if he should die before that age, to the intent, that his (the testator's) wife should receive an annuity of 150*l.* during her life; and, subject to the term and the said annuity, he devised all the said estates to his son Joshua for life; and, after the determination of that estate by forfeiture or otherwise, with remainder to trustees to preserve contingent remainders, yet nevertheless to permit the rents and profits to be received by his said son, paying thereout, to his son Edmond Shallet Lomax, if he should be then living, an annuity of 175*l.*, and in case of his death, to such persons as should be entitled thereto under his marriage settlement; and to pay the residue of the said rents and profits until his son Joshua's [*118] decease or attainment of the age of *twenty-five to his wife, if then living; and from and after the decease of Joshua he devised the said estates to his first and other sons and the heirs male of their bodies respectively; remainder to his daughter Susannah for life, and to her first and other sons in the same manner; remainder to his son Caleb Lomax and the heirs of his body; remainder to his own right heir.

The trusts of the term of 500 years were in the first place for securing the said annuity of 175*l.*, and in the next place for raising by

(a) As to conditions in reference to marriage, see *Scott v. Tyler*, 2 Bro. C. C. (Am. ed. 1844,) 431, 488, 489, and notes; *Parsons v. Winslow*, 6 Mass. 179-182.

(b) See 2 Madd. Ch. Pr. (4th Am. ed.) 34-36. Where a marriage settlement does not conform to the intention of the parties, either through mistake, or the fraud of one of the parties, it will be corrected by a Court of Equity. *Scott v. Duncan*, Dev. Eq. 403. See *Allen v. Rumph*, 2 Hill. Ch. 3.

(c) 2 Williams, Executors, (2d Am. ed.) 1461; Willis on Trustees, 146.

sale or mortgage, or other disposition, to and for Elizabeth Lomax and Matilda Lomax, the two eldest daughters of his wife Susannah, and to his said daughter Susannah Lomax, the sum of 1500*l.* a-piece to and for their respective portions, and to be paid to them upon their marriages respectively, provided and upon condition, that they should respectively be married with the consent and approbation of their mother, if living, and of the said William Thrle, John Cooper, and William Lawrence, or the survivor of them, in case of, and after, the decease of his said wife; and upon farther condition, that each of the person or persons, to and with whom they should respectively be contracted in marriage, shall and do previous to the solemnization of their marriages respectively settle and convey by proper deeds the sum of 3000*l.* in money or a freehold estate of that value, free from all incumbrances, as a provision for them, his said daughters, respectively and their children, in case of their surviving their respective husbands; and upon farther trust in the mean time, and until the said portions of the said Elizabeth, Matilda and Susannah Lomax should respectively become payable, that they, his said trustees, and the survivor, &c., do and shall by and out of the rents and profits of his said premises raise and pay unto each of them, the said Elizabeth, Matilda, and Susannah Lomax respectively, until their respective portions should become payable and be paid respectively, the sum of 60*l.* a-year by half-yearly payments for their maintenance and support respectively, the first payment to be made at the end of six months next after his decease; and upon farther trust, in case his son Joshua Lomax and his daughter Susannah should die without having issue male, having issue one or more daughters respectively, for raising two sums of 5000*l.* for the portion of such daughters respectively, as therein mentioned.

* The testator then, after giving certain legacies, be- [* 119] queathed to the same trustees all the money he should be possessed of in any of the public funds at the time of his death, and all his ready money and securities for money, book-debts, and effects, not before bequeathed, except a mortgage debt, which he gave to his wife to be disposed of among such of her children as she should think most deserving of the same or any part thereof, in trust after paying all his debts, legacies, and funeral expenses, which he directed might be done in the first place, that they do and shall pay and apply the said residue of his said personal estate, so far as the same would extend, in the discharging of the legacies hereinbefore bequeathed or directed to be raised to or for the said Elizabeth Lomax, Matilda Lomax, and Susannah Lomax, as the same should become due and payable, in ease of his said real estate, or to or for any purpose, that they might judge most beneficial for his said son Joshua Lomax; and he appointed his said trustees executors.

The testator died upon the 2d of December, 1786. In May, 1792, Henry O'Callaghan became acquainted with Mrs. Lomax and her daughter Susannah at Bath; and soon afterwards made proposals of marriage to the daughter in the presence of her mother;

which were accepted with her consent and approbation, provided he could make the settlement, which by the terms and conditions of her father's will was to be made by the person marrying Susannah; and which the mother then informed O'Callaghan must be by adding the sum of 1500*l.* to the 1500*l.* bequeathed by the will, and settling the whole of the said 3000*l.* upon Susannah and the children of the marriage. In consequence of this O'Callaghan soon left Bath; and went to Ireland, to procure the 1500*l.* In April, 1793, he returned to England; and told Mrs. Lomax and her daughter, that he had some difficulty with his father as to the advancing the 1500*l.* He staid with them about three months at Bath and at the house of Mrs. Lomax; and then he went again to Ireland. In March, 1794, he returned, and told them, his father was dead; and in consequence he was become possessed of estates and property in Ireland amounting to between 300 and 400*l.* a year, besides upwards of 1500*l.* secured by bonds and mortgages, which he then proposed should be taken as his part of the money to be settled; to which Mrs. Lomax objected; saying, it must be 1500*l.* in money, or secured [*120] upon property in England. * After staying near three months he went again to Ireland; and about Christmas, 1794, he sent inclosed in a letter to Susannah Lomax nearly the whole sum of 1500*l.*; and in February 1795 he returned to England with the remainder; and informed Mrs. Lomax and Cooper, who principally acted in the trusts of the will, that he was then prepared and ready to settle 1500*l.* together with the 1500*l.* bequeathed by the testator; upon which they for the first time informed him, that the trustees could not raise and pay the 1500*l.* bequeathed by the will, until the sum of 3000*l.* was first settled by him. After this, and previously to his marriage, he repeatedly offered to Mrs. Lomax and Cooper to settle the whole of his estate and property, as well as the 1500*l.*, which he had brought to England; and he proposed, that Mrs. Lomax should send a person to Ireland at his expense to inquire into the value of the estates. He also produced and delivered to Cooper his title-deeds; who afterwards returned them, saying, they seemed to be fair and right. The estates in Ireland were leasehold estates for lives, renewable for ever, and leaseholds for 999 years.

On the 11th of March, 1795, they were married; no settlement having been made. Cooper, as Secretary to the Archdeaconry Court at St. Albans, made out the license. In May, 1797, O'Callaghan offered to settle 3000*l.* of his own money, provided the trustees would undertake to raise the 1500*l.*, and pay the same to him after the settlement; upon which Cooper took an opinion of Counsel; who recommended the sanction of a Court of Equity; upon which the bill was filed; stating all these circumstances; charging, that the condition was illegal and void; and praying, that the will may be established, and the portion raised and paid; the Plaintiff offering to make such settlement as the Court shall direct; or that the Plaintiff may be decreed entitled to the annuity of 60*l.* under the will.

The Defendant Cooper by his answer admitted, that the Plaintiff represented to him, that it was not in his power to raise more than 1500*l.* of his own money; that he was ready to settle that sum, as the trustees should approve; and would enter into any engagements, that they and the Plaintiff and his friends should think proper, for settling his intended wife's portion of 1500*l.* so soon as it could be raised; and that he was willing to make a settlement of * his property in Ireland, if that was approved, for the same [* 121] purpose. He admitted, he might after perusing the title-deeds say, they appeared to him to be a legal security: but he did not think himself justified in acceding to that proposal; as they were a security of a different nature from what was directed by the will, and on account of the distance of the country might be attended with trouble and expense. He denied, that he told the Plaintiff, that if at any time subsequent to the marriage he would settle 3000*l.* he would be entitled to her portion. He admitted the Plaintiff's offer since the marriage, as stated in the bill.

The depositions of Mrs. Lomax stated, that the first time she had any intimation of the objection to the Plaintiff's adding 1500*l.* to the 1500*l.* under the will, was in October, 1794, when the Plaintiff was in Ireland, from her son Caleb; who had been to Doctors' Commons to inspect the will, with a barrister; who gave an opinion, that it would not do; and till then there was a common mistake of them all as to the construction of the will. She stated, that that was not her husband's intention; for in a conversation with him in 1786 she represented, that it would be a hardship upon her daughters, if they could not marry, unless to a person, who would settle 1500*l.*; and she put the case to him of proposals from gentlemen of the bar or the church, or of a man in trade; which might be very good matches, and yet it might be inconvenient to them to settle 1500*l.*; to which he answered, that it would be no greater hardship, than it was to him; who upon his first marriage was obliged to settle 300*l.* a-year of his own property with 300*l.* a-year, the portion of his wife.

She farther stated, that she understood, that the marriage might be solemnized, before the provision required by the will was made; and she gave her consent to its being so solemnized previously; and her having said the contrary by her answer was a mistake; the Plaintiff having promised to settle the whole 3000*l.*, as soon as the sum of 1500*l.* under the will should be raised; that she believes, Cooper was of the same opinion, from his having readily made out the license without expressing any opinion to the contrary; and the marriage was with the entire consent of her and the trustees.

* According to the depositions of Mrs. Lomax, Matilda Lomax, Caleb Lomax, and another witness, Joshua Lomax repeatedly before marriage offered to give his sister Susannah a bond for the 1500*l.*, and declared, that as soon as he was of age he would take care, that sum should be paid. By his answer he denied that, to the best of his recollection and belief: but he admitted, that he had approved the marriage. [* 122]

Mr. *Mansfield* and Mr. *Leach*, for the Plaintiffs. The Plaintiff is entitled to have this portion raised according to *Daley v. Desbouverie* (1) and many other cases. *Reynish v. Martin* (2) goes in all points to this. The condition there was held to be *in terrorem* as to the real estate only; and the assets were marshalled. That has undoubtedly been shaken by the latter cases, *Scott v. Tyler* (3) and *Stackpole v. Beaumont* (4); where your Lordship observed upon the impropriety of applying the rules of the Civil Law with respect to marriage in this country; the English Law imposing restraints on marriage under the age of twenty-one. But in this case the restraint is not confined to that age but extends to their whole lives; and depends, not on the trustees only, but on strangers. That part of the condition prescribing the settlement to be made on the part of the husband is still more against the policy of the Law: the effect being to restrain very proper matches, as stated in the deposition of Mrs. Lomax; though not strictly evidence. Such a power might be immoderately exercised; which is a reasonable supposition from the cautious avarice of testators. If a restraint as to fortune is permitted, it may be followed up by restraints as to rank and other circumstances.

But, supposing the Court can permit such a restraint, it must be taken according to *Daley v. Desbouverie*, that the Plaintiff has done what in Equity will be considered as a literal performance; which he tendered; but was prevented by the mistake of the trustee and ignorance, not wilful. A settlement of the 1500*l.* which he offered, with a covenant to settle her 1500*l.* would have been a strict performance. Besides that, he tendered the title-deeds of his Irish estates; which vastly exceeded the sum required.

[*123] * But if the Plaintiff fails upon both these points, there is another in respect of the life estate of the Defendant Joshua Lomax; who, though we do not desire a personal decree against him, shall not under these circumstances take benefit by the breach of the condition.

The Attorney General [Sir John Mitford], and Mr. Hart for the Defendant Joshua Lomax. There was no engagement to settle 3000*l.* except the offer in the bill. The arguments founded upon those cases, in which conditions in restraint of marriage without consent have been controlled, cannot apply in the least to this case; for the testator has made a provision, which he unquestionably had a right to make; that if a settlement of a particular description is made upon his daughter, then she shall have 1500*l.*; if that settlement is not made, then she shall have nothing. It is a previous condition; in consequence of which the trustees are to act; and unless that condition is performed, they cannot act. This case is

(1) 2 Atk. 261.

(2) 3 Atk. 330; 1 Wils. 130.

(3) 2 Bro. C. C. 431; 2 Dick. 712, from Lord Thurlow's mss.

(4) *Ante*, vol. iii. 89. See the notes, pages 98 and 139.

governed by *Harvey v. Aston* (1). Lord Chief Justice Willes very sensibly observes in giving his opinion, that the Court cannot make a will for the testator. The distinction suggested, that the personal estate may be applicable, though the real is not, has no ground to support it since the late cases. In this instance the personal estate is merely given in the ease of the real, or for any purpose the trustees shall judge most beneficial for the testator's son Joshua. The other legacies and the debts are not charged upon the real estate; therefore there is no subject for marshalling (2). The testator only meant, that, if there should be any surplus of his personal estate, which is not the case, it should be so applied. There is no ground for supposing, a compliance with the condition was prevented by contrivance or management. Has this Plaintiff entered into any contract to settle 3000*l.*? Suppose, he had died in the interval, before this bill was filed, containing that offer: could this 1500*l.* have been raised then? There was no contract; nothing, under which that sum could have been raised as a charge against his property. Then this sum would have been her's, not his; not being reduced into possession; and it would be *to be [* 124] raised for her benefit. Suppose, he had died, and she had afterwards married a man, who had settled 3000*l.* upon her: would he not be entitled to this sum of 1500*l.*? The previous marriage would not have prevented that. It is contended, that the sum to be found by the husband was not necessarily to be more than 1500*l.*; the sum of 3000*l.* being composed of that sum and her 1500*l.* The will cannot be so read. The true intention was, that to entitle herself to that sum she should marry a man, whose property amounted to 3000*l.* Borrowing the money was not within the testator's view. A condition with that view is perfectly rational; and no Court of justice has a right to say, it shall not take effect. He intended her fortune to be in proportion to the settlement. Upon this argument the usual provision for a jointure in proportion to the fortune of the wife is against the policy of the law, encouraging marriage. A testator has a right to stipulate, that the person, who is to marry the object of his bounty, shall have a fortune of such a value; for, if not, he is a burthen. As to third point, against the Defendant Joshua Lomax, if he had agreed in writing to give his bond, the Court would have relieved against it as a fraud. He had no means of paying it: and must have been persuaded by his mother and the rest of the family. But this conversation can never bind him. According to the Plaintiff's account his proposal was with a view to an actual settlement before marriage: but they did not pursue that. They married without the least attempt to make a settlement, or

(1) Com. 726; 1 Atk. 361, and other books mentioned in Mr. Sanders's edition. The Lord Chancellor observed, that there was a very good note of Lord Chief Justice Willes's opinion, in the Reports lately published from his manuscripts, 83.

(2) That the equity for marshalling assets does not apply to such cases, where the legacy fails to affect the real estate by an event subsequent to the death of the testator, not being in the first instance a charge distinctly and solely upon the personal estate, see *Pearce v. Loman*, ante, vol. iii. 135.

any contract, that in case Mrs. O'Callaghan is entitled to the 1500*l.* 3000*l.* shall be settled, or any provision for the payment of 1500*l.* by him. The Plaintiff therefore is not entitled to call for this portion; as he might have been, if he had entered into any contract, that might have been considered an equitable, though not a legal performance: if he had gone farther, and left the title-deeds: but he has done no one act.

Mr. *Mansfield*, in reply. I do not dispute the previous condition, but I contend, that either it was satisfied, or, if not, that was occasioned by the mistake of the trustee in not accepting the proposed security upon the estate. The whole was mistake. The mother never intended, that her daughter should marry without a proper settlement; and she supposed, a settlement after marriage would do as well. The Plaintiff was always ready to make a settlement; [* 125] and sending the money to her and marrying in consequence, he must have been bound.

Lord CHANCELLOR [LOUGHBOROUGH]. He was bound within a great many cases (1).

It is impossible not to feel a wish to relieve in this case. It struck me, that it might rest upon the head of mistake: first, the mistake of the trustee, that the Irish estate was not a good settlement: he states by his answer, that he objected to it: there is no restriction to warrant that: then, if it proceeded upon that other mistake, that the settlement might be executed as well after marriage as before. I do not think, the manner, in which he by his answer denies having given that opinion, is inconsistent with what Mrs. Lomax says; that she gave her consent upon that ground, and she believes, it was his opinion. Suppose, he had intimated an assent to that opinion; and consider the act, that he does, as Secretary to the Archdeacon, in making out the license. It is a foolish enough way in the will, but certainly very strongly put, that the 3000*l.* must be previously settled; and he takes the case of contracting; that each of the persons, to whom his daughters shall be contracted, shall and do previous to the solemnization of their marriages respectively settle and convey the sum of 3000*l.* or a freehold estate of that value. The Plaintiff might have borrowed the 1500*l.* and paid it the day after the marriage. It is very clear upon the evidence, that there might have been a settlement, that would have fully answered the condition: 1500*l.* and the Irish estate were more than was necessary. If the marriage took place upon the consideration, that the settlement could be made afterwards, it would be very hard not to relieve, now that the marriage has taken place. They had been a long time about it. The conduct of the Plaintiff was very fair and honorable. At first he was told, it was enough for him to find 1500*l.* Then the opinion was taken, which I think right, that the settlement must be previous to marriage. If they had any management about it, they might easily have done it. Then the Irish

(1) *Luders v. Anstey*, ante, vol. iv. 501; post, 213.

estate was offered. Every thing was ready, that was to be done. Considering this as a case of mistake, if by that any prejudice had * happened to any party, I could not relieve: [*126] but now the thing is entire.

Direct an inquiry, whether at the time the marriage took place a proposal had been made upon the part of the Plaintiff to settle an estate of the value of 3000*l.*; and whether the sum of 1500*l.* had been produced by him before the marriage; and let the Master examine the Defendant Cooper upon it; and let the Master farther inquire, whether the Plaintiff is now of ability to make such a settlement; and reserve farther directions.

After this decree was pronounced the Lord Chancellor directed the minutes to stand a few days; and desired to see the depositions and pleadings; observing, that he thought, he could make a ground broad enough for the decree without an inquiry: that it could be brought to this case; that it was in the power of the friends, guardians, and trustees, to make a settlement for her. The Plaintiff had put the money into her hands; and had delivered the title-deeds of his estate to them; and if so, his Lordship said, whatever the blunder was, he took it to be a fair case for relief.

Dec. 7th. Lord CHANCELLOR [LOUGHBOROUGH]. In this cause I proposed to direct an inquiry by the Master: but I have looked into the depositions and the pleadings; and I do not think it necessary to send it to the Master to state any facts; for I think, there are facts enough disclosed by the depositions and the answer to support the decree I shall make.

I have no doubt, the construction, that was put upon the will, is the just construction; and that the settlement was to be a settlement of 3000*l.* upon the part of the husband. But under the circumstances of the case, I think, there is a fair ground to entitle the husband, the wife, and the issue of the wife, who are all interested, to the benefit of this provision by the will of her father; because, though not in form, yet in substance, all might have been done, that was required by that will to be done, if it had not been for the mistake, but certainly the neglect, on * the part of the [*127] trustee; to whom the execution of the business, as trustee and agent for the family, was confided. The whole conduct of the Plaintiff was perfectly fair. He makes his addresses to the daughter of the testator, having met her at Bath, first by a communication to the mother. She gave her consent upon condition, that he should settle what she and all of them (for it appears to be a common mistake) took to be all the will required, namely, 1500*l.* to be added by him to the portion of 1500*l.*, and settled. He was put upon raising this 1500*l.* He does not in fact raise it. He remits it; remits it with great confidence, the greater part into the hands of the lady he is to marry, with the knowledge of the mother. The rest he brings with him. He comes over, having made this remittance, and being

ready to make a settlement according to what he had been informed was the effect of the will ; when by a discovery, not arising from the knowledge of this trustee, who had made the will, but had forgot it, but from the anxiety of one of the brothers, who took an opinion upon the will, he then was informed, that it was necessary for him to bring in 3000*l*. Having provided 1500*l*., all that he had been informed was necessary, he then produces and delivers to the trustee the title-deeds of lands of the annual value of between 300 and 400*l*. There were then those deeds and the 1500*l*. ; and the trustee by another mistake imagines this will not do, because the lands are out of the jurisdiction, being in Ireland. With this he had the means given him of preparing a settlement ; which the Plaintiff was ready to execute. Instead of that the trustee, by another mistake I believe, acting as the common agent, sees no objection to the marriage proceeding. It is distinctly proved, that it was with his privity ; for he was the surrogate, who made out the license. The marriage was had. After the marriage, it is admitted in the answer, the Plaintiff was ready and willing to make that settlement to the full extent of the requisition by the will : but nothing was done upon it ; and no settlement was made. Every branch of the family gave their full approbation. The brother, conscious of that, had repeatedly declared, that as soon as he was of age, he would take care, that the 1500*l*. should be paid. I cannot make a decree against him upon that ; for the parol declaration will not bind him.

But this is substantially within the intention ; and the performance of the condition, by * which the fortune was to accrue to her, was defeated by no fault of the Plaintiff ; but by the mistake, I must call it neglect, of the trustee. It was put into his hands. He did not know how to do it ; and therefore the marriage was had without a settlement. It is very clear, if it had turned the other way, and the Plaintiff had held back, he was bound ; for he had proposed a settlement, and had taken steps for carrying the proposal into effect ; and if he had by surprise married after proceeding so far, no doubt, I should have held him bound. He therefore being bound, and a settlement precisely in the terms of the will being defeated purely by the neglect and mistake of the trustee, I am clearly of opinion, the trustee should pay that fortune, the settlement being now executed (1). I cannot give the Defendant Cooper his costs ; for his mistake produced the whole (2). I mean to recite the facts ; that the decree may not be supposed to go upon the interpretation of the condition in the will. The facts I assume, are, I think, all established by the pleadings without farther examination.

Declare, that, the Plaintiff, having upon the treaty of marriage with his wife obtained the consent of Mrs. Lomax, the mother, upon condition that he should provide the sum of 1500*l*. to be added to

(1) The Plaintiff offered in Court to settle 3000*l*. of his own.

(2) Beames, on Costs, p. 149.

the portion given to Susannah Lomax by the will of her father, and having actually raised and remitted such sum, to be settled, together with the farther sum of 1500*l.* upon her and the children of the marriage; and being farther informed, that it would be necessary to provide the sum of 3000*l.*, exclusive of her portion, in money, or a freehold estate to make up that amount, and having thereupon produced and delivered to the Defendant Cooper, the trustee upon the said treaty, the title-deeds of a freehold estate, to which no other objection was made but that the lands lay in Ireland, and the marriage having afterwards been solemnized with the privity of the said Defendant Cooper, the trustee, and the approbation and consent of the mother and all the family, though the settlement had not been executed, and it being admitted by the answer of the said Defendant Cooper, that the Plaintiff after the marriage had declared to him, that he was ready and willing to execute the settlement proposed for 3000*l.* upon his part, and being bound so to do, the non-performance of the condition in the terms prescribed by the will is to be imputed to the neglect of *the said Defendant Cooper, and ought not to prejudice the rights of the Plaintiffs and of the issue of the marriage; and declare, that upon the Plaintiff's executing a settlement pursuant to the conditions of the will of the testator in such manner as the Master shall approve, the portion of 1500*l.* ought to be raised, and applied according to the directions of such settlement. Refer it to the Master to receive proposals for such settlement; and upon the execution thereof let the said Defendant Cooper, the trustee, raise by sale or mortgage of the term such sum for the principal and interest of the portion as the Master shall find to be due, together with the costs of all parties, except the Defendant Cooper, to be taxed by the Master.

1. In many cases, where consent to a marriage has been given on the offer of a settlement, though the intention may seem to have been, that the settlement should be before marriage, still, a settlement after marriage has been held sufficient; *Dashwood v. Lord Bulkeley*, 10 Ves. 244; for Courts of Equity are always disposed to be most liberal in the construction of agreements, on the faith of which marriage has taken place, and in enforcing the execution of such agreements on both sides. See, *ante*, the note to *Luders v. Anstey*, 4 V. 501.

2. No costs can be given to a trustee, whose neglect, caprice, or mistake, has been the sole cause which rendered the suit necessary. *Caffrey v. Darby*, 6 Ves. 497; *Taylor v. Glanville*, 3 Mad. 178; *Jones v. Lewis*, 1 Cox, 199.

THE MAYOR AND COMMONALTY AND CITIZENS OF
THE CITY OF LONDON v. BOLT.

[1799, DEC. 7, 9.]

INJUNCTION in pressing cases upon petition and affidavit (a). In this instance, converting old houses in London to a purpose, that made them dangerous to the public, the Lord Chancellor granted the injunction; but said, the Lord Mayor by his general jurisdiction could apply a much more proper and effectual remedy.

SEVERAL old houses on Snow Hill, which, being soon to be pulled down in consequence of the plan for improving that part of the City, were empty, had been taken by the Defendant as temporary warehouses for stowing sugar; which he had introduced in such quantities, that two of the houses had actually fallen; and others were in the most imminent danger.

On Saturday, the 7th of December, Mr. Cox applied upon a petition for an injunction to restrain the Defendant from putting any more sugar into the houses.

The affidavits in support of the petition verified the facts; and stated, that, since the two houses had fallen, the Defendant had put more sugar into the others.

Mr. Cox said, the bill was nearly ready; but on account of the great pressure the Lord Chancellor might upon petition and affidavits make an order out of Court; and for that purpose the case of *Chamberlyne v. Dummar* (1) was mentioned.

It was said at the bar, that the Lord Mayor thought, he had no authority to act.

[*130] *Lord CHANCELLOR [LOUGHBOROUGH]. I have no difficulty in granting the injunction upon petition and affidavit; and have often done so. It is often necessary in the vacation. But I can only order the injunction upon the petition. I

(a) It is irregular to serve the defendant with an injunction without taking out and serving him at the same time with a *subpoena* to appear and answer. *Parker v. Williams*, 4 Paige, 439. See *Patrick v. Harrison*, 3 Bro. C. C. (Am. ed. 1844,) 477, and notes; *Leebor v. Hess*, 5 Paige, 85.

In New York no injunction can issue in any case until the bill has been filed. 1 Barbour, Ch. Pr. b. 3, c. 5, § 3, p. 615. This applies only to cases begun by bill. *Ib.* 616.

Where the cause is commenced by petition, the filing of the petition is a substantial compliance with the requirement of the law. *Ib.*

The motion for an injunction of whatever description, is usually made *ex parte*, on filing the bill, and in such cases the writ issues at the same time with the *subpoena*. Sometimes, however, in cases of difficulty and importance, the Chancellor will not hear the motion *ex parte*, but will require notice to be given to the defendant. *Attorney Gen. v. Utica Ins. Co.* 2 Johns. Ch. 375. See *Foley v. Blacker*, 1 Craw. & Dix, 56. The injunction, if prayed for in the bill, may be applied for by petition at any stage of the proceedings. *M'Intyre v. Maucius*, 3 Johns. Ch. 45. But see *Moore v. Reed*, 1 Ired, Eq. 419. See, upon this subject, Eden on Injunct. (2d Am. ed.) 77, *et seq.*; 1 Smith, Ch. Pr. (Am. ed.) 592, 593, *et seq.*; 1 Barbour, Ch. Pr. b. 3, c. 5, § 3, p. 615, *et seq.*

(1) 1 Bro. C. C. 166.

cannot order any thing to be done; and it will be necessary to do more; as shoring up the houses, and removing the sugar. I shall make the order upon the petition: but it seems to me, the Lord Mayor can apply a much more proper and effectual remedy. Can there be a doubt, that it is within his office upon the presentment of the ward, that these houses are a public nuisance, to order the nuisance to be abated, the houses to be shored up and the weight removed? Abating a nuisance cannot be a trespass; or, if any one was foolish enough to bring an action, he could not recover a penny damages. The Chief Magistrate by his general jurisdiction has authority to abate a nuisance in a public street, to shore up the houses under the direction of a surveyor, and make it safe for the public. I can interfere only as between landlord and tenant.

On Monday the 9th of December the certificate of the bill filed was produced; and the order was made for the injunction (1).

1. THE Court of Chancery is always open, and an injunction may issue in the vacation. *Temple v. The Bank of England*, 6 Ves. 771. It does not, however, seem to follow necessarily, that when the Court is sitting it is proper to grant (as Lord Rosslyn thought he might in the principal case,) an injunction, upon petition, before bill filed. Lord Hardwicke expressly declared it was contrary to the course of the Court to do so, however desirous it might be to exercise its jurisdiction in that mode; *Marasco v. Bolton*, 2 Ves. Sen. 112; and not only should the bill be filed, but the defendant ought, it seems, to be served with a *subpoena*. *Attorney General v. Nichol*, 16 Ves. 339.

2. The interposition of the Court of Chancery in cases of nuisance, is very confined and rare; nor does there seem any disposition to extend the interference in such cases, and still less to grant injunctions in them *ex parte*, or without notice of the motion; *Attorney General v. Cleaver*, 18 Ves. 217; but when all proper parties are before the Court, and a case of nuisance is stated, of such a nature as to be attended with extreme probability of irreparable injury to property or health, certainly an injunction would be granted. *Crowder v. Tynckler*, 19 Ves. 622; *Attorney General v. Johnson*, 2 Wils. Cha. Ca. 102; *Wynstanley v. Lee*, 2 Swanst. 335.

3. The doctrine held by Lord Rosslyn in the present case, that "he could interfere only as between landlord and tenant," was in accordance with the observation of Lord Thurlow, that the Court would never interfere by injunction to stay waste, or in analogous cases, when the party was a mere stranger, and might be turned out of possession forthwith. *Mortimer v. Cottrell*, 2 Cox, 205. Lord Thurlow, however, changed his opinion, and held that where a defendant is taking the substance of a plaintiff's inheritance, Equity ought to grant an injunction. *Thomas v. Oakley*, 18 Ves. 186; *Mitchell v. Dors*, 6 Ves. 147. And Lord Eldon has frequently granted an injunction in trespass to prevent irremediable mischief. *Twort v. Twort*, 16 Ves. 130; *Crockford v. Alexander*, 15 Ves. 139. But this extension of the jurisdiction has not been admitted where the plaintiff's title to the property on which the waste was committed, is disputed by the answer; *Norway v. Rowe*, 19 Ves. 147; and see note 1 to *Price v. Williams*, 1 V. 365; though an injunction may be granted in respect of alleged patent rights, notwithstanding the legal title may be doubtful; see the note to *Bolton v. Bull*, 3 V. 140.

(1) See, *post*, vol. xviii. 216, 217, *Attorney General v. Cleaver*; *Crowder v. Tynckler*, vol. xix. 617.

WYNN v. WILLIAMS.

[1799, Dec. 9.]

MORTGAGEE may protect himself against a claim of dower by taking an assignment of an old mortgage term prior to the right to dower (a).

Account of arrears of an annuity decreed against a purchaser with notice : the length of time not being sufficient to raise a presumption of satisfaction (b), [p. 130.]

EDWARD PHILIP PUGH, by his will, dated the 2d of November, 1768, gave to his daughter Ann 900*l.*, to be paid her out of his lands and hereditaments ; and he charged his estates in the counties of Caernarvon and Denbigh with the payment, as well of the said legacy as of his debts ; and he gave and devised unto his wife Mary Pugh for her life an annuity of 100*l.*, payable out of his said estates ; and subject to the said legacy, &c. he gave all his said estates to his son James Coytmore Pugh in tail general ; with remainders over ; and the reversion to his own right heirs for ever ; and he appointed his wife residuary legatee and sole executrix.

The testator died in 1769 ; leaving his son James Coytmore Pugh ; two daughters, Bridget Wynn, and Ann Hughes ; and his wife ; who had no provision in bar of dower. In May 1770 James Coytmore Pugh, having suffered a recovery, mortgaged these estates in fee to Sir William Wynn for 6000*l.* To that mortgage Mary Pugh was made a party, for the purpose of postponing to the mortgagee [* 131] her rights to dower and to the annuity. Afterwards in 1773 a farther mortgage in fee was made upon a farther advance by Sir William Wynn, amounting in the whole, together with the former sum to 8000*l.* ; namely, 900*l.* paid by Sir William Wynn to Ann Hughes on account of her legacy ; and the farther sums of 660*l.* and 440*l.* borrowed by Pugh. Mary Pugh also joined in this transaction in the same manner and for the same purpose as before. By various mesne assignments the mortgages became vested in Doctor Gisborne. By indenture of lease and release, dated the 11th and 12th of December, 1779, the estates were conveyed, subject to the mortgages, to the Defendant Williams, who purchased the equity of redemption for 2100*l.* from Pugh. Upon the 16th May, 1791, Williams paid to Gisborne what was due to him for principal and interest : namely 9105*l.* Gisborne, whose first mortgage was in 1775 for 5000*l.* to which Mary Pugh was also a party, for the same purpose of postponing her rights as dowress and annuitant, made subsequent advances ; and had taken possession of the estates some time previous to the death of Mary Pugh. Several old mortgages made by Edward Philip Pugh for

(a) This protection seems not to have been afforded to a purchaser with notice in any instance but that of dower, or against any other person but a dowress. 3 Sugd. Vend. & Purch. (6th Am. ed.) 47, [75], 197, [283] ; 1 Story, Eq. Jur. § 410, note (1), and cases cited ; 4 Kent, (5th ed.) 87-89.

(b) See 3 Sugden, Vend. & Purch. (6th Am. ed.) 103, [161.]

several terms of 500 years, in which the wife of the mortgagor had joined by fine, being paid by the money advanced by Sir William Wynn, were assigned to him; and afterwards to Gisborne, and Williams, respectively. Mary Pugh was not a party to the conveyance to Williams. She made her will upon the 21st of April, 1781; and died on the 4th of June. Mr. Glynn Wynn and his wife Bridget took out administration to her with the will annexed.

The bill was filed in 1796 by Bridget Wynn, her husband being dead, against James Coytmore Pugh, Thomas Williams, and Ann Hughes; praying an account of what was due to Mary Pugh at her death in respect of her dower and the annuity of 100*l.* and that the same may be raised by sale or mortgage of the real estates; and if the said estates are not of sufficient value to answer what is due for the dower, and to pay the legacy of 900*l.* and the debts, then that an account may be taken of what remains due on account of the said legacy; also an account of the rents and profits received by the Defendants or either of them since the death of the testator; and that the said rents and profits may be applied in the first place in discharge of what is due for dower, and then in discharge of the *legacy, and the debts and annuity, as far as they [* 132] will extend; and that the deficiency may be raised by sale or mortgage.

Upon the death of James Coytmore Pugh, leaving the Plaintiff and Ann Hughes his sisters and co-heiresses at law, the bill was revived.

The bill charged, that the Defendant Williams was the attorney of Mary Pugh; that she acted under his directions; and was induced by him to join in the mortgages.

The Defendant Williams by his answer submitted, that Mary Pugh having by the several indentures aforesaid postponed her annuity and dower to the mortgage, and that mortgage not having been paid off till some years after her death, she was not in her lifetime entitled to any sum of money in respect of either the dower or annuity; and therefore the Plaintiff cannot now set up any demand in respect thereof; and the premises are not liable thereto; that Mary Pugh was by the means aforesaid barred of dower; that the indentures of 1770 and 1773 have a retrospective view to, and operate as a confirmation of, the assignment of the several terms of 500 years in 1752 and the said fines. He admitted, he was the attorney of James Coytmore Pugh and Sir William Wynn with regard to the mortgages of 1770 and 1773; but denied, that he was the attorney of Mary Pugh; and that she acted under his directions.

In support of the charge, that the Defendant was the attorney of Mrs. Pugh, and she acted by his directions, several letters from him to her were produced in evidence: but the Master of the Rolls during the argument expressed his opinion, that they did not come up to that.

This cause having been argued at length upon the circumstances

by Mr. *Piggott* and Mr. *Wynn* for the Plaintiff, and Mr. *Richards* and Mr. *C. Smith* for the Defendant, stood for judgment.

Dec. 9th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN],^r (after stating the case). It was attempted for the Plaintiff to have the Defendant Williams, who in the transaction of Sir William Wynn's mortgage was agent to him, and appears also to have been agent to the tenant in tail, considered as agent to Mrs. [* 133] Pugh. But I cannot find him in any degree * concerned for her upon the letters and the evidence. Application was made upon that occasion to her and to Miss Pugh, now Mrs. Hughes; and Williams wrote a great many letters to Mrs. Pugh; informing her, that Sir William Wynn would not advance his money, unless they would postpone their claims. He reasons with her, but leaving it to her judgment; and gives his opinion as to one part of her claim, namely, under the will of her husband. But this was imparted to her not in the character of agent. In consequence of these several letters to her in 1769 and 1770 she did consent; and by joining in the deed she did postpone her charges, both the dower and the annuity of 100*l.*, to this mortgage. Sir William Wynn, it seems, was not long afterwards desirous of assigning his mortgage, and of being paid off; and Doctor Gisborne took an assignment of the mortgage and of the several outstanding terms; and Mrs. Pugh joined then, as she had done before, in postponing her right, either as dowress or annuitant to that mortgage. She therefore retained her right then, subject only to that mortgage for 5000*l.* Mrs. Hughes had before received her 900*l.* Doctor Gisborne afterwards made farther advances. So it stood in 1779; when the transaction arose for the purchase of the equity of redemption by Williams. The effect of that was, that, the equity of redemption, subject to Gisborne's mortgage, and also to any charge the widow might have upon it at that time, was purchased by the Defendant Williams for 2100*l.* which, as far as appears to me, was paid to James Coytmore Pugh. Gisborne, it seems, not long afterwards, finding, I suppose, the interest of his mortgage in arrear, took possession; and continued in possession, till he was paid off in 1791; the purchase of the equity of redemption having taken place in 1779; and the widow dying two years afterwards: so that at the time of that purchase there were due to her all the arrears both of her dower, if she was entitled as dowress, and the arrears of the annuity of 100*l.*; and the Defendant purchased subject thereto. She was not called upon by him to join in releasing her right. She had no knowledge or notice of his purchase.

The question is first, whether she was guilty of any laches in not making her demand in respect of the dower and the annuity from Williams, so purchasing the equity of redemption. It is very clear, it was impossible for her to avail herself of these charges against Gisborne, the mortgagee, taking possession, holding subject to all the charges, to which it was subject in his hands; and against whom she could recover neither her dower

nor her annuity. Upon the first question I am of opinion upon the cases, that have been determined, that Gisborne was free by the terms he had taken both as to the 5000*l.*, his original mortgage, and the sums advanced by him afterwards. It is perfectly established, that a purchaser for valuable consideration from the owner of the equitable interest may protect himself, though the owner could not, by the assignment of any outstanding terms. He might therefore protect himself against any demand she might have of dower at law. The decision is a very ancient one; and was affirmed by the House of Lords (1). Therefore, however questionable it might have been, it is now clear, that a purchaser or a mortgagee, who is a purchaser *pro tanto*, though he knows of the right of dower, may advance his money, and taking in a term may avail himself of it; though the consequence will be utterly defeating her right of dower. Williams also upon paying off Gisborne procured to himself a like assignment of the terms; and he stands in the same situation, a purchaser of estates, subject to dower, but upon which he has a term for years preceding that; and which he was perfectly at liberty to set up against any title of her's in right of her dower; such as is now set up by her administratrix to the arrears. Therefore as to any account of dower the bill must be dismissed.

The next consideration is, as to her claim in respect of the annuity; upon which the arrears of about ten years had accrued at the time of the Defendant's purchase. The testator died in 1769, and from that time to the time of the purchase she was entitled to the arrears, subject to the debts of the testator. Then Williams, who had perfect knowledge of her claim, chose to purchase this equity of redemption and instead of paying the money to satisfy outstanding debts, if there were any, he thought fit to pay it to Mr. Pugh; who had no interest in the estate except subject to those arrears of the annuity, and to take no release or deed from her, waiving her right. Then he purchased Gisborne's interest; and in 1791 became complete owner of the estates; and entered into the receipt of the rents and profits. Under these circumstances the question is, whether this is not a claim she has a *right to enforce [*135] against this Defendant. Two objections are made: first upon his answer; in which he does not even insinuate, that there is a presumption of satisfaction from the length of time elapsed before her death, or to her representative since. He does not put his defence upon any such ground. There is no foundation for that presumption: otherwise I should be extremely glad to avail myself of it. But he does not insinuate that, or put it so. His defence is, that Gisborne having come into possession as mortgagee, her annuity being postponed to that mortgage, and the Defendant having come in as purchaser of the equity of redemption, and the mortgage not

(1) *Lady Radnor v. Vandebendy*, Show. Parl. Cas. 69; Pre. Ch. 65; 1 Eq. Ca. Ab. 219. See Mr. Butler's note, Co. Lit. 208, a. n. 1, comprising a very full note of Lord Hardwicke's judgment in *Swannock v. Lifford*, Amb. 6, and 2 Atk. 208, by the name of *Hill v. Adams*; post, *Maundrell v. Maundrell*, vol. vii. 567.

having been paid off till some years after her death, he is not now liable. If he had stated any ground of presumption of satisfaction, I should perhaps have been glad to have laid hold of that; for no man is more glad to raise presumptions against all latent claims (1). But that is not the ground he takes.

Another defence was made for him at the bar; that as these estates were under the will liable to debts, *non constat*, but that this purchase money of the Defendant might have been applied to debts; which are paramount her annuity; and therefore he is entitled, as unquestionably he would be, to stand in the place of Mr. Pugh, so far as any money was advanced by him in payment of those paramount debts. It is not alleged, that there was any such application in payment of particular debts: nor is there any trace, that I can find, that the estate was exonerated by the purchase of the equity of redemption: nor can the Defendant upon this transaction have a right to call upon the Court to make that inquiry. I have no doubt nor ever had, that this was a charge upon the equity of redemption. The Defendant purchasing from Pugh under the will of his father, purchased with clear notice. Then has he a right to say, if the purchase-money was applied to payment of debts prior to the annuity, he is discharged? I cannot enter into that without a very burthen-some account of all the estates Mr. Pugh died seised of; what part was sold; their value; the application of every sum James Coytmore Pugh received, and applied to the debts of his father; to see, whether he can avail himself of this point; which from the letters I can hardly suppose. I believe, those debts were discharged by James Coytmore Pugh. Therefore, I do not think, the Defendant has a right to call for an account: which, I believe, would [* 136] not be to his advantage, and * would be attended with an enormous expense. I shall not therefore direct that account now: but will hear the Defendant's Counsel upon it, if they choose. You may raise before the Master any presumption: therefore I must not till the result of the account determine as to costs.

The last point, as to an inquiry, whether the purchase-money was applied to the debts, was then given up by the Defendant.

The bill as against Ann Hughes was dismissed with costs. As to the dower it was dismissed without costs. An account was directed of the arrears of the annuity from the death of the testator to the death of his widow. It was declared, that what should be found due on that account was a charge upon the equity of redemption purchased by the Defendant Williams; and that he was liable to the payment thereof; and the costs were reserved.

The Master reporting the sum of 1200*l.* to be due for the arrears of the annuity, upon farther directions the Defendant was decreed to pay interest at 4 per cent. upon that sum, and the costs since

(1) *Ante*, Jones v. Turberville, vol. ii. 11, and the note, p. 15. [See note (a) to vol. ii. page 13, and the authorities there cited.]

the decree: but no costs were given on either side previous to the decree.

1. A PURCHASER may effectually displace a right of dower of which he had full notice when he made his purchase, by taking in an outstanding term. *Mole v. Smith*, Jacob's Rep. 497. If it were *res integra*, such a proposition, it has been said, would be monstrous; the rule, however, though not resting on any principle which will bear the test of reason, but solely on the practice of conveyancers, is become inveterate. *Maundrell v. Maundrell*, 10 Ves. 271, 272; and see, *ante*, note 3 to *Cox v. Chamberlain*, 4 V. 631.

2. The purchaser of an estate charged with an annuity cannot defeat it, if he had even constructive notice. *Toulmin v. Steere*, 3 Meriv. 222.

3. With respect to claims of interest, upon arrears of an annuity, granted in bar of dower; see note 2 to *Tew v. The Earl of Winterton*, 1 V. 451.

MIDDLETON v. MESSENGER.

[ROLLS.—1799, DEC. 5, 9.]

BEQUEST to the testator's wife for life; then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests; (a) a codicil in favor of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities, [p. 136.]

JOHN MESSENGER by his will, dated the 17th of March, 1785, after directing his debts to be discharged, proceeded thus:

"*Item*, I give and bequeath unto my well-beloved wife Lydia Messenger all the interests of my money arising from the 3 per cent. Consolidated funds, and also the profits arising from all my estates whatsoever, and the use of all my household furniture, during the term of her natural life; and at her decease I give to my daughter-in-law Ann Little the interest arising from 1500*l.* for her sole use during her natural life; but to stand in my name deceased; and if any misfortune by sickness or lameness should attend the said Ann Little, that she may at any time hereafter be rendered incapable of going to receive her interest money, my will is, that she appoint by letter of attorney a person to receive the same: *Item*, I give and be-

(a) Where a legacy is given to a class of individuals, it will take in all, who answer the description at the time the gift shall take effect. *Swinton v. Legare*, 2 M'Cord, Ch. 440; *Jenkins v. Freyer*, 4 Paige, 47; *Cole v. Crayon*, 1 Hill. Ch. 322.

Where there is a fixed period for distribution, in a devise to children, all the children born before that time will be let in and none others. *Myers v. Myers*, 2 M'Cord, Ch. 256. But if the period is left indefinite, or, if the gift is *per verba in presenti*, none but those born before the death of the testator can take. *Id.*; *Jenkins v. Freyer*, 4 Paige, 47; *Van Hook v. Rogers*, 3 Murph. 178. See *Hansford v. Elliott*, 9 Leigh, 79. For a more full consideration of this subject, see *Andrews v. Partington*, 3 Bro. C. C. (Am. ed. 1844,) 404, note (a); *Hill v. Chapman*, *ib.* 391, 392, and notes; S. C. 1 Ves. jr. 405, note (a); 2 Williams, Executors, (2d Am. ed.) 797, 798.

queath unto my sister O'Brien and to my sister Charlewood ten guineas annually each, being the interest of 700*l.*, to [*137] stand in my name deceased: The *remainder of money in the funds and all my estates of every kind or nature whatsoever to be sold by a fair auction, and the sums of money arising therefrom to be equally divided among brothers' and sisters' children (Susan Charlewood expected) to whom I bequeath one shilling."

He then gave some mourning rings, and to John Middleton and George Odel ten guineas each; and he appointed them executors.

The testator afterwards made the following codicil:

"As the legatees die the benefit of the interest moneys to go into the family of my brothers' and sisters' children then surviving equal share and share alike."

The testator died upon the 3d of June, 1786. Besides stock and household furniture he was possessed of leasehold estates. His widow received the interest and dividends of his 3 per cent. Annuities and the profits arising from all his estates, and had the use of all his household furniture, during her life. She died upon the 12th of May, 1795. The annuitants named in the will survived her.

The bill was filed by the executors to have the accounts taken, and the claims of the parties ascertained; and by a decree made at the Rolls upon the 12th of December, 1786, the accounts were directed; and an inquiry, who were the brothers and sisters of the testator; whether they had any and what children living at the time of his death; if any were dead, who were their personal representatives; and whether any of them (except Susan Charlewood), were living at the death of the testator's widow.

The Master's report specified the brothers and three sisters of the testator; and stated, that several of their children were living at the testator's death; and some of them died before the death of his widow. None were born after the testator's death.

By another decree, pronounced upon the 16th of February, 1798, it was directed, that 1500*l.* 3 per cent. Consolidated Bank Annuities, part of 3350*l.* standing in the name of the testator, should be carried to the account of the Defendant Ann Little, and the [*138] *interest to be paid to her for her life; and it was declared that upon her death the said 1500*l.* would belong to such of the children of the testator's brothers and sisters (except Susan Charlewood) as should be living at the death of Ann Little. The decree farther directed, that 700*l.*, other part thereof, should be carried over in manner following: viz. 350*l.* to the account of the testator's sister, the Defendant Sarah Clempson (formerly O'Brien); and the interest thereof should be paid to her for life; and 350*l.*, the other moiety, to the account of his sister Ann Charlewood; and the interest thereof be paid to her for life: and it was declared, that the said two sums would belong to such of the children of the testator's brothers and sisters (except Susan Charlewood) as should be

living at the respective deaths of Sarah Clempson and Anne Charlewood. Some inquiries were directed as to James Messenger, a brother of the testator; who went to sea in 1785; and has not since been heard of. Advertisements were published for his children: but none came in.

The cause coming on for farther directions, the question was, whether the general residue belonged exclusively to the children of the testator's brothers and sisters (except Susan Charlewood), who were living at the death of the widow; or whether children, who died between the death of the testator and the death of his widow, were entitled with the others. The Counsel for the Plaintiffs were directed by the Court to support the point in favor of all the children living at the death of the testator.

Mr. Lloyd, Mr. Graham, Mr. Fonblanque, and Mr. Benyon, for the children living at the death of the testator's wife. Upon the will taken without the codicil it would be too clear for argument, upon the authorities, that it would have vested in the children living at the death of the testator, as well as at the death of the wife. But the question arises upon the will coupled with the codicil. The codicil must mean children surviving at the death of the legatee; and the effect of it cannot be restrained to the annuitants only: but it relates to every person taking an interest under the will; the testator's wife as well as the others. There is no ground for confining the operation of the codicil to the annuitants, excluding the widow. It is impossible, that the testator could use this language without intending to vary the bequest. The words must * have their effect; and they cannot be applied to the con- [* 139] tingency of a child dying in the life of the testator. It was unnecessary for him to express, that they should be living at his own death. The law does that.

Mr. Richards and Mr. Grimwood, for the representatives of the children, who died between the deaths of the testator and his widow. This is a gift of the residue to the testator's wife for life; for the old distinction between a gift of the interest or use of a thing and of the thing itself does not now prevail. He gives her the interest of his property of every denomination whatsoever for her life, and the use of his household furniture. Then he distinguishes it into portions; and makes this disposition; the effect of which is, that after her death he takes from the residue certain parts; and the residue of that residue he gives to the children of his brothers and sisters. The expression "interest moneys" in the codicil cannot apply to all, that was given to his wife; for he also gave her the use of his furniture and the profits of all the rest of his property. She cannot be considered a legatee in the common acceptation of the word. The word "legatees" in the codicil must apply to those, who only can be properly considered legatees, viz. the annuitants in contradiction to residuary legatees.

Dec. 9th. MASTER OF THE ROLLS [Sir RICHARD PEPPER AR-

DEN]. I have looked over this will with much attention ; and I do not say, I have not some doubt upon it ; and that I have not in some degree changed my opinion in the consideration of the question. But upon the whole will take together with the codicil I am of opinion, the codicil upon the true construction is not explanatory, but restrictive ; a distribution only of so much as had by the will been appropriated ; the interest of which he had given in different proportions to Ann Little, Sarah Clempson, and Anne Charlewood. By the will making no farther disposition of the 1500*l.* and 700*l.* so appropriated, which are still to stand in his name, he proceeds to dispose of the remainder of his money in the funds and all his other property after those appropriations. I understand, he had several leasehold estates. It appears to me upon the face of the will, and according to the construction put upon words of division [* 140] at the deaths of tenants for *life and the authority of *De Visme v. Mello* (1), that the remainder of his money in the funds and the produce of all his other estates, when sold, were divisible among all the children of his brothers and sisters, except Susan Charlewood, living at his own death, and such, if any, as might be born before the death of his wife, and the representatives of such as should be dead in the life of his wife. That is fully established in that case ; in which every circumstance contained in this occurs. It is clear upon that case, to which I perfectly subscribe, that under such a disposition the fund is divisible among such of the objects, as are living at the testator's death, and such as shall be born, before the fund is distributable ; and that they are vested interests. If that is the true construction of this will, and it is clearly so, if *De Visme v. Mello* is right, the question is, to what the codicil relates ; and it was contended, that it related, not only to the sums appropriated to the annuitants, but that it was explanatory of the words the testator used, when speaking of the remainder of his money in the funds, after that appropriation, and all his other estates ; to restrain the disposition, as it does, as far as it relates to the subject of it, to children then surviving. But upon the true construction of this codicil I am of opinion, it was not to relate to any thing but the interest undisposed of by the will ; and that the testator did not mean to disturb what was given by the will, but to dispose of what had been left undisposed of, the sums of 1500*l.* and 700*l.* after the deaths of the annuitants.

Declare, that the residue of the testator's personal estate, after the appropriation of 1500*l.* and 700*l.* 3 per cent., &c. for satisfaction of the annuities given by the will to Ann Little, Sarah Clempson, and Ann Charlewood, is distributable among the children of the testator's brother and sisters (except Susan Charlewood) living

(1) 1 Bro. C. C. 537 ; [Am. ed. 1844, 537-542, and notes.] See the cases upon this subject collected and classed by Mr. Fonblanq. Treat. Eq. vol. ii. 346, and by Mr. Sanders, 1 Atk. 122, in a note upon *Heathe v. Heathe*. See also *Spencer v. Bullock*, *Taylor v. Langford*, *Malim v. Barker*, *ante*, vol. ii. 687 ; iii. 119, 151, and the note, *ante*, i. 408.

at his decease, and the representatives of such as died in the life of his wife.

SEE, *ante*, note 3 to *Hill v. Chapman*, 1 V. 405; and note 3 to *Malin v. Keighley*, 2 V. 333.

VEZ v. EMERY.

[* 141]

[ROLLS.—1799, DEC. 5, 9, 11.]

EXECUTOR in trust for infants having paid under a written obligation, executed abroad, though in possession of a counter obligation to repay part with interest at the death of the party, acknowledging that to be so much more than the debt, and neither instrument having been transferred, was charged, as having paid incautiously, though innocently; and therefore he was permitted to try the question at law.

THE bill was filed on behalf of infants, entitled to the residue of the personal estate of David Vez under his will, against the Defendant, the executor; and the accounts were decreed.

An exception was taken to the Master's Report by the Defendant on the ground, that in the account of the personal estate of the testator, the Master had allowed the Defendant only 400*l.* in respect of a payment by him of 600*l.*, appearing to be due to Francis Vez, the testator's brother, upon a promissory note, executed by the testator in Switzerland; of which the following is a translation:

"I promise to pay at the requisition of my brother Francis Vez the sum of 600*l.* sterling with the interest at 5 per cent. This sum is in cancellation of a bill for the same sum. Dated at Nevy the 25th of September 1788.

"DAVID VEZ."

The ground, upon which the Master disallowed the 200*l.*, was, that the testator owed his brother no more than 400*l.*; as appeared by another note, also executed in Switzerland; of which the following is a translation:

"As my brother David Vez has made me a bill, by which he promises to pay at my requisition the sum of 600*l.*, which is 200*l.* sterling more than he owes me, I engage and promise, that after my death and not before the said 200*l.* sterling shall be returned to him as to his heirs with interest. Done at Geneva the 3d October 1788.

"FRANCIS VEZ."

A proceeding had been taken by the uncle of the Plaintiffs, on their behalf as guardian, in a Court of justice in Switzerland; under which a sentence had been pronounced, treating the second note as

void ; and under that sentence the Defendant paid the whole 600*l*. A translation of these proceedings, which were of an extraordinary nature, and not very intelligible, was produced.

Francis Vez died after the exception was taken.

[* 142] * Mr. *Richards* and Mr. *Leach* in support of the Exception. This is not a question with creditors. All are volunteers. It is difficult to say, why the 600*l*. was not payable out of the assets of the testator. There is no explanation of this second note. There was a considerable discussion upon this in the Court in Switzerland ; who were of opinion, that the whole sum was due. Under these circumstances the executor is not to be charged twice. This was not an accommodation transaction. It has been decided upon demurrer, that in a promissory note it is not necessary to allege value received, upon the principle in *Pillans v. Van Mierop* (1), that a promissory note for a gift is good. These two notes are parts of the same transaction. The consideration for the note for 600*l*. was the debt of 400*l*. and the counter-note taken. Then suppose, an action had been brought against the testator for the 600*l*., there was no want of consideration within the rule, that a counter-engagement affords a principle for an action. This therefore was a strict legal demand ; but undoubtedly it was a sufficient authority to an executor to pay, and cannot be a *devastavit*.

Mr. *Piggott* and Mr. *Steele*, for the Report. It is not pretended, that any interest in this obligation was transferred to any third person : nor is the instrument in its form negotiable. This is now claimed as a debt under Francis Vez ; and he could claim it against the testator in no other capacity than as a creditor. Claiming it as a debt he must show a consideration. It is clear upon the two instruments taken together, that the debt was only 400*l*. : but for the purpose of some accommodation the testator's brother induced him to make the note for 600*l*. I agree, if it had been negotiable, or if without any notice of the counter-demand he had assigned the equitable interest in it to another person, that person would have been a creditor : but this is claimed by Francis Vez himself, the executor being possessed of this counter-declaration ; which is decisive evidence, that 200*l*. of that sum was no debt, and was to be paid back. Suppose, the testator had lived to fulfil the obligation. The plain meaning is, that if he should pay that sum of 600*l*., then his brother would become his debtor for 200*l*. ; for which by agreement credit was to be given till the death of Francis Vez, and then to be paid with interest. A more unequivocal declaration of debt

[* 143] * cannot be. As to the 200*l*. it was purely accommodation.

It is acknowledged in the second bill to be without consideration as to that. Then it was a breach of duty in the executor, in possession of such evidence of that, to pay it ; and this strange proceeding in Switzerland, which is called the decision of a Court of justice, cannot be attended to. In the case in the Court of King's

Bench there were circumstances distinguishing it. There is no form of declaring upon a promissory note, that does not aver a consideration. The instrument may be *prima facie* evidence: but the moment you show, there was no consideration, it is quite impossible as between the original parties to recover.

Mr. *Richards* in reply. The first note is a positive engagement to pay, whenever Francis Vez chose to call for this sum of 600*l*. The other instrument admits that engagement, but undertakes to return 200*l*. at the death of Francis Vez. It is said, that, as it was to be returned with interest, the transaction amounts to nothing: but it cannot be said, that as between these parties the testator was not liable to pay the 600*l*. Whether upon the counter-note this transaction can be considered as a mutual engagement, importing a consideration, or not, it was quite sufficient between these parties to justify the payment of 600*l*. There is nothing in the second instrument making it an engagement to pay only 400*l*.: and they must bring it to that. The former is a distinct engagement; and upon the latter Francis Vez was entitled to the full use of the 200*l*. for his life, paying interest. If the executor was mistaken, the testator led him into the mistake.

The Master of the Rolls during the argument showed a strong inclination against the Plaintiffs. The Court also observed, that the opinion of Wilmot, Justice, in *Pillans v. Van Mierop* had been impeached (1).

Dec. 9th. MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN], after stating the case. This Defendant, the executor, finding this counter-note among the testator's effects, and being called upon by the testator's brother for the 600*l*. under the first note, very incautiously, but I believe very innocently, paid the whole 600*l*. It is said, Francis Vez is since dead; whereby the 200*l*. is *now become payable: whether with interest from his [*144] death, or from the time it was advanced, may be hereafter matter of doubt. But the only question upon this exception is, whether the Defendant is answerable as having misapplied or improperly advanced this sum. This is a most ungracious demand; and if the Plaintiffs were adults, they would not have thought it proper. Upon this proceeding in Switzerland, the children living there, upon full consideration, which, I am sorry to say, is rather against the executor than in his favor, they thought, that upon the whole Francis Vez had a right to have this sum advanced; and something like a decree, or rather an award, to that effect was made; and the executor instead of taking some advice, how far he was bound to make this payment, thought fit upon that proceeding and

(1) In *Rann v. Hughes*, 7 Term Rep. B. R. 750, n. This and other points upon the nature of the consideration necessary to sustain the several sorts of contracts by the Civil Law and by the Law of England are very fully discussed by Mr. Fonblanque, Treat. Eq. vol. i. 335.

his own notion of the law of England, to pay the whole sum. It is now said, he was under no obligation to pay more than 400*l.*, and being a trustee for infants he was in so doing guilty of a breach of trust. I very much wish, that consistently with the rules of the Court I could hold him fully justified: but, when I consider his neglect in making this payment of his own conjecture, and to the wrong of the *cestuys que trust*, I must hold, that the Master was right in charging him. He certainly acted with a good intention; and imagined himself justified; but he thought fit to depend upon that, which a prudent executor would not have relied on, this strange transaction in Switzerland. If he had taken advice, and been advised by any gentleman of the law in this country, that he was bound to make this payment, I would not have held him liable; for I will not permit a testator to lay a trap for his executor by doing a foolish act, which may mislead him (a). But upon this transaction the Defendant did not act a prudent part in making this payment without inquiring, whether he was bound to pay. Certainly it appears to me, he was not.

The Defendant's Counsel then applying for leave to try the question at law, the Master of the Rolls said, he would willingly permit that; and on the 11th of December it was declared, that the personal representative of Francis Vez, should be at liberty to bring an action upon the note, admitting, that, 400*l.* was received, against the Defendant, the personal representative of David Vez, admitting assets; and that the Plaintiffs should be at liberty to defend the action in the name of the said Defendant.

THE opinion of Mr. Justice Wilmot, in *Pillans v. Van Mierop*, 3 Burr. 1663, (adverted to by the Court upon the present occasion,) was, in a subsequent case, on a writ of error from the Court of King's Bench, fully considered and over-turned; see *Tate v. Hilbert*, 2 Ves. Jun. 117.

[* 145]

POPE v. SIMPSON.

[1799, DEC. 8, 13.]

A PURCHASER under a bankruptcy must take such title as the bankrupt had; and cannot insist upon a title strictly free from objection, as in other cases (1). In such a case, the purchaser objecting to the title, but insisting on his purchase, his bill for a specific performance was under the circumstances dismissed with costs, except as to some parts of the answer and the depositions containing irrelevant matter.

THE bill was filed to compel a specific performance of a contract for the sale of the fee simple and inheritance of a house in Fetter-

(a) 2 Williams, Executors, (2d Am. ed.) 1282, *et seq.*; *Doyle v. Blake*, 2 Sch. & Lef. 233.

(1) Over-ruled. See the note, *post*, p. 147.

lane; which on the 15th of February, 1796, was sold by auction at Garraway's Coffee House by the assignees under a commission of bankruptcy against Barker Simpson. The particular described the premises as a freehold house, to be sold by the direction of the assignees of the bankrupt; and it contained the usual conditions of sale: namely, that the purchaser should immediately pay a deposit of 20*l.* per cent., and sign an agreement for payment of the remainder of the money on or before the 25th of March, 1796, upon having a good title; that he should have a proper assignment of the premises at his own expense on payment of the remainder of the purchase-money; that if he should neglect or refuse to comply with the above conditions, the deposit should be forfeited; and the deficiency of the produce of the re-sale, if any, together with the expense, be defrayed by the purchaser, &c.

The Plaintiff was declared the best bidder at the sum of 84*l.* An abstract of the title was by the Plaintiff's solicitor laid before a conveyancer; who suggested several inquiries, as necessary. Upon that subject a long correspondence took place between the solicitors; in which it was insisted for the assignees, that the inquiries suggested were unnecessary, the title having commenced in possession near 100 years previous to the sale; 68 years in a continued, regular, derivative line; and 28 years in another, taking title from that family; with a fine levied upwards of 10 years, not to better the title, but to bar the dower of the wife of one of the persons to whom the fee-simple was conveyed. The solicitor for the assignees expressly stated, that they could give no better title; and desired, that the Plaintiff would either take the title as it appeared upon the abstract, or refuse it. On behalf of the assignees he also proposed, that if the Plaintiff would pay the whole expense of the sale, the abstract, &c. the assignees would risk the expense of another sale, and all objections, that might be made to the title by another purchaser. That proposal was rejected by the solicitor for the Plaintiff; who required, that the objections, that had been taken, should be cleared, and the inquiries made.

* Under these circumstances the premises having been [*146] resold by the assignees at the same price to the Defendant Green under a resolution of the creditors at a meeting called for that purpose, the bill was filed upon the 9th of November, 1796. Information was given to the Plaintiff of the intention to re-sell; and his deposit was tendered to him. It was in evidence also, that the Plaintiff lived very near the house; and the intention of Green to purchase it was publicly known in the neighborhood: but there was no communication on the subject between him and the Plaintiff. It was also proved that Green had notice of the former sale; but was informed, the Plaintiff was unwilling to complete the contract.

All the correspondence between the solicitors and the circumstances attending the re-sale were set out at length in the answer. The

depositions for the Defendant also went very much at large into the circumstances.

The *Attorney General* [Sir John Mitford] and Mr. Romilly, for the Plaintiff. Mr. Mansfield, for the Defendant.

The Lord CHANCELLOR observed, that this was a sale by assignees of a bankrupt; and they can sell only the title they have. His Lordship seemed to think the objections to the title frivolous; but said, if a single inquiry had been desired, and they had refused it, he should have thought it peevish and wrong: but these inquiries were so numerous, that it was impossible for the Defendants, assignees selling this small estate under a bankruptcy, to satisfy them.

The bill was dismissed, and, as it was taken, with costs generally: but the Plaintiff not so understanding it, the Attorney General on the 13th of December applied to the Court upon that point.

Lord CHANCELLOR [LOUGHBOROUGH]. I had excepted the costs of the depositions; and I thought it very right, that it should be referred to the Master to see, whether it was necessary to set out the letters.

The ground I went upon in dismissing the bill was this; that when persons purchase from the assignees of a bankrupt, [* 147] * they have no right to expect more than that the assignees should deliver over such title as the bankrupt has; and it was a fair proposal on the part of the assignees to say, "take it; or be off." I went upon the proof of the tender of the deposit. Let them pay the deposit.

The decree, as it was varied with respect to the costs, directed the Master not to allow the Defendants the costs of the depositions, except as to the tender, nor of the letters and resolution of the creditors under the commission of bankruptcy set forth at length in the answer (1).

THE authority of the principal case is destroyed: it is now settled, that assignees are as much bound as any other vendors to show a good title to any property they offer for sale; see, *ante*, note 9 to *Cooper v. Denne*, 1 V. 565; see also, the other notes to the same case, for a statement of the general doctrine, as to the title which a purchaser has a right to insist upon.

(1) This decision is over-ruled: *post*, vol. xi. 343, 5, *White v. Foljambe*; *McDonald v. Hanson*, xii. 277; xviii. 511, 512, *Deverell v. Lord Bolton*; and in *Spurrier v. Hancock*, *ante*, vol. iv. 667; Lord Rosslyn's objection was not taken. *Orlebar v. Fletcher*, 1 P. W. 737, which has been also noticed (*Law of Vendors and Purchasers*, p. 308, 5th edition) as opposed to *Pope v. Simpson*, has this distinction; that the contract was not, as in that case and *Spurrier v. Hancock*, with the assignees, but with the bankrupt before his bankruptcy; clearly binding his assignees to make the title, for which he had contracted. Lord Rosslyn's opinion is confined expressly to a sale by the assignees. *Freme v. Wright*, 4 Madd. 364: [see 2 Sugden Vend. & Purch. (6th Am. ed.) 102, 152, 153.]

SIR W. PULTENEY v. SHELTON.

[1799, Dec. 16.]

SERVICE on the Defendant's wife ordered to be deemed personal service on the Defendant; (a) and upon that service ordered, that he stand committed for breach of injunction (b).

UPON a bill by a landlord against his tenant for an injunction to restrain the Defendant from carrying away from the premises the dung, soil, and compost, or the crops growing from seeds sown since the 25th of March, 1799, from ploughing up meadow, and committing wilful damage, waste, and spoil, the injunction was granted till answer and farther order, 28th August, 1799 (1).

Upon affidavit that the Defendant was duly served with the writ of injunction, but that since, namely, 25th October, 1799, he had carried off large quantities of oats and barley growing from seeds sown since the 25th of March last, also a part of the dung and compost, it was ordered, 28th November, 1799, that upon personal service of a notice of motion in this cause on the wife of the Defendant, that he should stand committed for breach of the injunction, the same should be deemed personal service on the Defendant. On affidavit of personal service of that order on the wife by delivering to and leaving with her a true copy at Meadow House, county of Salop, (the house demised), and showing her the original, and that deponent at the same time served her with notice of this motion by delivery, &c., and that he did explain to her the purport and intent of the said order, the *Solicitor General* [Sir William Grant], for the Plaintiff, moved, that the Defendant might stand committed for a breach of the injunction.

The Lord CHANCELLOR [LOUGHBOROUGH] made the order (2).

1. A LESSEE, or tenant from year to year, who has committed, or threatens to commit waste, may, upon a bill filed by the landlord, be restrained by injunction; and if the defendant abscond, to avoid service of the injunction, service on his wife, at the house demised, will be deemed good service; (see this same case cited in note to 5 Ves. 260;) and sending the *subpena*, under cover, to the person to whom the defendant had directed his letters to be sent, has been ordered to be good service: *Hunt v. Lever*, 5 Ves. 147: so, more especially, where it appeared plainly that the defendant had notice of the order and process, it should seem indisputable, that service on his clerk in Court would be sufficient; *De Manneville v. De Manneville*, 12 Ves. 205; but if it were not quite clear that the defendant had notice of the order, perhaps service both at his dwelling house and also upon his clerk in Court would be directed. *Farrow v. White*, 1 Jac. & Walk.

(a) See 1 Smith, Ch. Pr. (Am. ed.) 116, 117; 1 Barbour, Ch. Pr. b. 3, ch. 5, § 7, p. 631; Eden on Injunct. (2d Am. ed.) 93.

(b) See 1 Smith, Ch. Pr. (Am. ed.) 623, 624.

(1) See the note, *post*, p. 260.

(2) *Post*, *Lathropp v. Marsh*, 259; *Lord Grey de Wilton v. Saxon*, vol. vi. 106; *Ward v. The Duke of Buckingham*, cited x. 161; *Onslow v. —*, xvi. 173. As to dispensing with personal service, see *post*, *Hunt v. Lever* (the next case); *De Manneville v. De Manneville*, xii. 203; *Clark v. Greenhill*, 1 Dick. 91; *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 238.

645; *Pearce v. Crutchfield*, 14 Ves. 206. See the note to *Ellison v. Pickering*, 8 V. 319.

2. An injunction may be obtained by a landlord, to prevent his tenant from breaking up meadow or pasture land; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106; *Drury v. Molins*, 6 Ves. 328; or to prevent a tenant from removing crops or manure, except according to the custom of the country. *Onslow v. —*, 16 Ves. 173. It must be understood, however, that in order to entitle the plaintiff to the summary relief of an injunction, the acts complained of must be clearly acts of waste, or in contravention of express covenant, or agreement to be inferred from the course of dealing between the parties. *Kimpton v. Eve*, 2 V. & B. 349. If the question be only as to the proper quantity of land to be cropped, and there has been no special contract on the subject, *that* is more fit for the decision of a jury. *Johnson v. Goldswaine*, 3 Anstr. 750. In the case of *Lathropp v. Marsh*, 5 Ves. 261, according to the report, it was intimated that an ejectment ought to be brought before an injunction to stay waste was applied for; but it is obvious, that if the interference of Equity were suspended till after a trial at law, or default of the defendant at such trial, such tardy jurisdiction would, in most cases, be almost nugatory.

HUNT v. LEVER.

[1799, Dec. 16.]

SERVICE by sending the *subpœna* to the Defendant under cover to the person, to whom he had directed his letters to be sent, ordered to be good service.

MR. SHORT, for the Plaintiff, moved, that service of the *subpœna* to answer by sending it addressed to the Defendant, under cover to J. P. Esq. may be good service.

The affidavits in support of the motion stated, that the deponent has been informed and believes, the Defendant frequented The Keys, a coffee-house in Black Friars' Road; that upon inquiry there he was informed by the daughter of the person, who kept the house, the Defendant had five or six months past frequented [* 148] * that house; but had not since been there; nor had she since heard of him: the deponent is informed and believes, he conceals himself to avoid debts; and the deponent has seen a letter from the Defendant to the Plaintiff upon the subject of the suit, desiring him to address his answer to the Defendant under cover to J. P. Esq.

The Lord CHANCELLOR [LOUGHBOROUGH] said, he thought it reasonable; and made the order (1).

SEE note 1 to the last preceding case.

(1) See the preceding case, and the note.

ANONYMOUS.

[1799, Dec. 16.]

BIDDINGS opened on advance of 200*l.* upon 3200*l.*; but 100*l.* was held too little. (a)

MR. STANLEY moved to open biddings; offered an advance of 100*l.* upon 3200*l.*

The Lord CHANCELLOR [LOUGHBOROUGH] said, that was too little.

Mr. Stanley then offering 200*l.*, it was ordered (1).

As to opening biddings, after a sale before the Master, and a report confirmed; see, *ante*, the note to the *Anonymous case*, 1 Ves. 453.

SWEET v. PARTRIDGE.

[1799, Dec. 16.]

UNDER a decree for payment of debts out of cash in the Bank the Accountant General was ordered to pay the executor of a creditor by simple contract under a probate in the diocese, where he had resided, without a prerogative probate; the sum being small; and no *bona notabilia* out of that diocese. (See the note (2).)

THE Master's report in this cause stated, that the sum of 69*l.* 13*s.* 8*d.* was due to Thomas Wilcocks, blacksmith, one of the creditors of John Partridge; being his apportionment of the sum of 10,216*l.* 17*s.* 6*d.* cash in the Bank, standing in the name of the Accountant General; which by order was directed to be paid to the several creditors or their personal representatives.

Thomas Wilcocks being dead, his executor proved his will in the Archdeaconry Court of Barnstaple in the diocese of Exeter; there not being *bona notabilia* out of that diocese: the testator residing in that diocese; and this being a debt upon simple contract only.

*The Accountant General not thinking himself warranted in paying the executor without an order of the Court or a Prerogative Probate,

Mr. Short moved for an order upon the Accountant General to

(a) See *Anonymous*, *ante*, 1 V. 453, note (a), and cases cited; *Chetham v. Grurgeon*, *ante*, 86, and notes; *Scott v. Nesbit*, 3 Bro. C. C. (Am. ed. 1844,) 475 and notes.

(1) *Ante*, *Chetham v. Grurgeon*, 86; *Upton v. Lord Ferrers*, vol. iv. 700, and the references in the note; and the note, ii. 55.

(2) This case over-ruled, *post*, *Challoner v. Marshall*, vol. vi. 118; *Newman v. Hodgson*, vii. 409; *Thomas v. Davies*, xii. 417.

pay the money on the ground of the smallness of the sum and the expense of a Prerogative Probate.

The Lord CHANCELLOR [LOUGHBOROUGH] made the order.

THE principal case is repudiated as an authority: in order to get money belonging to a deceased testator, or intestate, out of Court, a prerogative probate, or administration, is indispensable, however small the sum may be. *Newman v. Hodgson*, 7 Ves. 409; *Thomas v. Davies*, 12 Ves. 417; *Challoner v. Murhall*, 6 Ves. 119.

NISBETT v. MURRAY.

MURRAY v. NISBETT.

[ROLLS.—1799, DEC. 13, 23.]

RESIDUARY disposition of all the testator's real and personal estate in Jamaica, in trust to be remitted to England, was held specific, and not to include a debt, originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of was applied in the first instance to the debts, &c. Executors having legacies of 20*l.* a-piece to buy mourning rings and equal specific legacies were upon the former held trustees of the undisposed of residue for the next of kin. *Qu.* Whether equal specific legacies would exclude them.

ROBERT NISBETT of the parish of Westmorland in Jamaica, planter, by his will, dated the 7th June, 1787, and executed in that island, after directing, that all his debts and funeral expenses should in the first place be paid off and satisfied, to the payment of which he subjected all his estates both real and personal, gave and bequeathed to David Murray and John Graham the sum of 20*l.* a-piece to buy mourning rings; and he gave, devised, and bequeathed, to a free mulatto woman, named Anney Gordon, some negroes and slaves, with fifteen acres of land in the said parish, upon which he ordered, that a house might be built by his executors; to hold the slaves with their issue and the said fifteen acres, with such house, unto Anney Gordon and her assigns during her life; and immediately after her decease he declared it to be his will and desire, that, the said slaves with their increase and the said house and land should revert to and become part of the residuum of his estate; and he thereby gave, devised, and bequeathed, the same in the same manner, and for the like purposes, as he thereby gave and devised the rest and residue of his estate. He then gave to a free mulatto, the daughter of Anney Gordon, named Elizabeth Gordon, a negro girl, named Peggy, with her increase; to hold to Elizabeth Gordon during her life and the life of any of her children, if she should have any; and after her decease and the decease of her children, if she had any, he declared it to be his will, that the said negro slave and her increase should revert to, and become part of, the residue of his estate; and he thereby bequeathed the said negro girl and her increase

in the same manner and for the like purpose as he thereafter gave and devised the residue of his estate; and he gave to Anney Gordon an annuity of 30*l.* currency, to be paid her yearly during her life; but subject nevertheless to the control of Murray and Graham, and to be discontinued by them upon the condition therein mentioned; and as to all the rest and residue of his estate both real and personal of what nature or kind soever in the said island of Jamaica, his household furniture and wearing apparel excepted, which he thereby gave to the said Anney Gordon, he gave, devised, and bequeathed, unto David Murray and John Graham, and the survivor, and the heirs and assigns of such survivor, in trust nevertheless to sell and dispose of the same, as soon as conveniently might be after his decease; and that the moneys to arise by such sale together with all other moneys belonging to his estate, or that should or might belong thereto, should be remitted to Great Britain, there to be lodged by them, Murray and Graham, in some public fund, bank or stock; and the said money so to be remitted and lodged, as aforesaid, he gave and bequeathed in manner following: that is to say; to his reputed son by Anney Gordon, named Robert Nisbett, 2000*l.* currency: unto his reputed son Archibald Nisbett, 2000*l.* currency; and to the reputed son of his brother James Nisbett by Mary Richmond in that part of Great Britain called Scotland, named James Nisbett, the farther sum of 2000*l.* currency; and the remainder of the said moneys, if any there should be, he gave and bequeathed to Murray and Graham: but in case the said moneys should not be sufficient to pay to each of them, the said Robert, Archibald, and James Nisbett the said sum of 2000*l.* a-piece, then he declared his will to be, that the said moneys should be equally divided among them, share and share alike; and he appointed Murray and Graham executors.

The testator died soon after the execution of the will. He had no property in Great Britain except the money received in England upon Lewis's debt, another small debt mentioned in the report, and some leasehold estates in Scotland. The executors took probate both in Jamaica and in England. The bill in the first of these causes was filed by the eldest brother and heir at law of the testator, and by another brother and sister. The other bill filed by the executors prayed the accounts; and in case the Court shall be of opinion, that the personal estate and effects of *the [*151] testator in this country or in any place out of Jamaica did not pass by the will, then that the same may be declared liable, and be directed to contribute rateably with the personal estate in the island, to the debts.

By the decree, pronounced upon the 16th of February, 1797, the accounts were directed to be taken. The Master by his Report, dated the 3d of June, 1799, stated, that the Defendant Archibald Nisbett received from the money, property and effects, in England, belonging to the testator, of Mr. Hare 14*l.* 7*s.* 6*d.*; and of Matthew Lewis, of London, Esq. 680*l.* 6*s.* 1 1-2*d.* and 659*l.* 6*s.* 1 1-2*d.*;

being two instalments of the sum of 2397*l.* 12*s.* 6*d.*, secured to the testator by the bond of Matthew Lewis, and also by a judgment obtained by the testator against him upon the bond in the Court of King's Bench at Westminster; which three sums the Master stated, he conceived to be the property of the testator in England; and he found, that the Plaintiff Murray about March, 1795, received in England the remainder of the said debt due from Matthew Lewis, amounting to 795*l.* 19*s.* sterling, as after stated: namely, in October, 1780, Matthew Lewis stood indebted to James Nisbett, then late of Jamaica, deceased, in the sum of 2994*l.* 13*s.* currency; for which or some part several judgments were obtained by James Nisbett against Matthew Lewis and William Lewis, his brother, or one of them, in Jamaica; and it was admitted, that Robert Nisbett, the testator, afterwards became the executor and residuary legatee of James Nisbett; and as such entitled to the said debt; and not being satisfied with the security of the judgment in Jamaica, by his letter of attorney, dated the 3d of January, 1784, authorized the Defendant David Nisbett to sue for and recover all debts whatsoever, which then were, or should hereafter become due to him by any persons whomsoever in Great Britain, either in his own right, or as executor of his brother James Nisbett; and that David Nisbett by virtue of the said letter of attorney applied to, and prevailed upon, Matthew Lewis to come to a settlement; and having about the 27th of July, 1786, ascertained the balance due for principal, interest and costs, to be 3357*l.* 16*s.* 6*d.* currency of Jamaica, which is equal to 2397*l.* 12*s.* 6*d.* sterling, David Nisbett upon behalf and as agent of Robert accepted the bond of Mathew Lewis to Robert Nisbett, his executors, &c. for payment of the principal sum of 2397*l.* 12*s.* 6*d.* and interest by instalments; which bond was given in England, with a warrant of attorney for entering up judgment in the Court [* 152] of King's Bench; under which judgment *was entered up as of Trinity Term, 1784, against Matthew Lewis; and it was admitted, that the Plaintiff Murray about March, 1795, received the remainder of the said debt, namely, 795*l.* 19*s.* sterling; which sum having been recovered and received in England upon the aforesaid judgment was, he conceived, the property of the testator in England.

An exception was taken to this Report by the Plaintiff David Murray; that the Master had stated, that the two several sums of 680*l.* 6*s.* 1 1-2*d.* and 659*l.* 6*s.* 1 1-2*d.*, the two instalments upon the sum secured by the bond and warrant, and which debt was originally secured by several judgments obtained in Jamaica by James Nisbett against Matthew, and William Lewis, and also the sum of 795*l.* 19*s.* received by David Murray, were property of the testator in England; whereas the Master ought to have reported, that those sums were property of the testator in Jamaica; as the debt was originally secured by judgments obtained there: and the subsequent judgment in England was given for better securing the debt; and was by no

means intended to cancel, or take place of, the judgment obtained in Jamaica.

During the argument reference being made to a deed of defeazance, executed by David Nisbett and Matthew Lewis, which was not stated in the Report, it was introduced into the cause by consent. That deed, dated the 27th of July, 1784, reciting, that Matthew Lewis of Margaret Street, Cavendish Square, was indebted to Robert Nisbett of the parish of Westmorland in Jamaica, planter, as sole executor of James Nisbett, heretofore of the said parish and island, carpenter, in a large sum of current money of the island for principal, interest, and costs, upon seven bonds from William and Matthew Lewis jointly and severally to James Nisbett, and executed in the island, bearing date respectively the 25th of November and the 1st of December, 1778, and upon seven judgments obtained in the island by Robert Nisbett against Matthew Lewis; and upon application by David Nisbett, as attorney under a letter of attorney, dated the 3d of January, 1784, to Matthew Lewis he proposed to account in respect of the said principal, * interest, [* 153] and costs, and pay part forthwith and the remainder by instalments; and for the farther and better securing the payment of such remainder, Matthew Lewis proposed and agreed to grant and execute a bond to Robert Nisbett and a warrant of attorney to confess judgment in the Court of King's Bench at Westminster upon the said bond for double the sum, that upon stating the account between him and Robert Nisbett in respect of the said principal, interest, and costs, due upon the said several bonds and judgments granted and obtained in Jamaica, should appear due thereon; and that Matthew Lewis hath this day paid to David Nisbett for the use of Robert Nisbett 250*l.* sterling; and by an account this day stated since payment of the 250*l.* between David Nisbett and Matthew Lewis in respect of the said bonds and judgments granted and obtained in Jamaica it appears, there is thereupon due unto Robert Nisbett for principal, interest, and costs, 3357*l.* 16*s.* 6 1-2*d.* currency; which is 2397*l.* 12*s.* 6*d.* sterling; and that Matthew Lewis had in pursuance of the agreement given his bond of even date herewith to Robert Nisbett, conditioned to be void upon payment by Matthew Lewis, his heirs, executors or administrators, unto Robert Nisbett, his executors, &c. of the principal sum of 2397*l.* 12*s.* 6*d.* of lawful money of Great Britain, with interest at 5 per cent. by annual instalments of 599*l.* 8*s.* 1 1-2*d.*; and that he had executed a warrant of attorney, &c. it was witnessed, and Robert Nisbett by his said attorney, did acknowledge, that the said bond so granted and the judgment to be entered were so granted, &c. only for the farther and better securing the payment of the said sum of 3357*l.* 16*s.* 6 1-2*d.* current money then remaining due and owing unto Robert Nisbett upon the said seven several bonds and seven several judgments, as aforesaid, which is in sterling money 2397*l.* 12*s.* 6*d.*., and the interest to become due upon the last mentioned sum; and Robert Nisbett promised, that he would not sue out any execution

upon the said judgment, when obtained, until default ; and that he would not sue out any execution, &c. upon all or any of the said judgments obtained in the island of Jamaica until default in payment of the said sum of 2397*l.* 12*s.* 6*d.* ; and that from and after payment and satisfaction of the said sum of 2397*l.* 12*s.* 6*d.* according to the condition of the said bond, Robert Nisbett, his executors, &c. will deliver up the same to be cancelled, and also acknowledge satisfaction upon the Record of the judgment, &c. or do any other [* 154] legal act, &c. to make void the said judgment, and * also acknowledge satisfaction upon the said seven several judgments in Jamaica ; and perform any other legal act, &c. to make void the said judgments ; and Matthew Lewis covenanted, that the said several bonds and judgments obtained in Jamaica, and all other judgments and other deeds and writings obtained or executed for securing the money due upon the said seven several judgments, shall remain and continue to be in full force and effect until payment and satisfaction of the said sum of 2397*l.* 12*s.* 6*d.* and interest, as aforesaid ; and that in default of payment of the said sum, &c. as aforesaid, it shall be lawful to Robert Nisbett, his heirs, &c. to proceed upon the seven several judgments, &c. until payment of the whole sum : provided, if any payments have been or shall be made or received by William Lewis or Robert Nisbett on account of the said principal money and interest due upon the said several bonds and judgments, &c. or the costs of the said judgments, all such payments shall be allowed.

Mr. *Richards* and Mr. *Stanley*, for the exception. Mr. *Lloyd* and Mr. *Hart*, for parties in the same interest. This money secured by a judgment in this country, being also secured by prior judgments in Jamaica, is to be considered as personal estate there. The testator intended to dispose of all his property in Jamaica. In 1780 this was a debt in Jamaica only. Can the collateral security given afterwards in this country to secure the same debt make a difference ? The question is, whether the testator considered this as part of his property not in Jamaica. The new security no more alters the locality of the debt than a mortgage given as a collateral security alters the nature of a debt before secured by bond. This testator had resided in Jamaica many years ; and had no personal estate in England, except what was due upon this judgment. He directs all his estate in Jamaica to be got in and disposed of. No doubt, the judgments secured to him the debt in Jamaica ; and it was part of his personal estate there. Suppose, Lewis had passed over to Jamaica, and had been there forced to pay it ; would not that have been property in Jamaica ? Will the circumstance of the executor receiving it in this country alter the nature of it ? It is impossible to suppose, the testator did not mean to dispose of all the property he had in the world ; that he intended to die intestate as to this security, that happened to be in the hands of his brother in England. It does not appear, that the testator knew, any farther security had been taken. The payment must be

considered as made upon the original bonds and judgments: what passed in this country being a mere private arrangement. The presumption is, that he authorized his attorney to receive the money and remit it to him in Jamaica. Can the act of the attorney without any recognition of the principal alter the nature of the debt; Payment to the agent can never alter the locality. The authority of the attorney was revoked by the death of the testator. The debt has no locality except by attaching it to the person of the creditor. It follows him. In an *Anonymous Case* (1) it was determined, that by a devise of all the testator's goods a bond passed. In *Chapman v. Hart* (2) upon a devise of all goods and chattels in the house, it was held, that a debt upon a bond in that house did not pass; for no other reason, I apprehend, than that the debt was not local, where the security was, but where the creditor was. The bond itself is no part of the debt, but only evidence of the debt. The testator enabling his brother to demand the debt made no difference as to the locality. One instalment was received in the testator's life. If it is to be considered an ademption, it may be so *pro tanto* without affecting the locality of the remainder of the debt. No intention appears beyond that; and the Court cannot imply an intention of what the testator would have done from what he has left undone. What was done without his authority cannot alter his property. With regard to all, that was not received, it remained a debt due in Jamaica.

But if this property in England is to be considered as not having passed by the will, but is undisposed of, the debts must be all thrown upon that in the first instance: *Sayer v. Sayer* (3); which is confirmed by the late case of *Howse v. Chapman* (4).

Mr. Piggott, Mr. Graham, and Mr. Pemberton, for the report. This depends entirely upon the words of the will, not upon any general rule as to the locality of debts. It is true, *choses in action* have no locality. It is plain, the testator precluded himself from proceeding in Jamaica; that he expected to receive the debt in England under the new engagement.

* Upon the other question, it can only be said, that the [* 156] testator making an express provision for his debts means to exempt every other part of his estate (5).

Mr. Richards, in reply. The judgments in Jamaica were the original judgments; to which the testator first gave credit. The other was only a collateral and farther security. That cannot alter the original nature of the thing. Suppose, no money had been received, that a general executor was appointed, the money due upon the original security, and also upon the collateral security in Eng-

(1) 1 P. Wms. 267.

(2) 1 Ves. 271; see *Porter v. Tournay*; *Jones v. Lord Sefton*, *ante*, vol. iii. 311; iv. 166.

(3) Pre. Ch. 392.

(4) *Ante*, vol. iv. 542; *Barton v. Cooke*, *post*, 461.

(5) See *Tait v. Lord Northwicke*, *ante*, vol. iv. 816; *Gray v. Minnethorpe*, iii. 103, and the cases referred to, p. 106.

land, and the property in Jamaica bequeathed to the children, the property in England left undisposed of. The executor is to call in the property. Does it depend upon this act; because he finds it more convenient to receive it in England?

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I rather think, I cannot hold this to be property in Jamaica, within the testator's contemplation, if I am to give this will any construction. It is a very extraordinary one. Upon the first part, where he directs all his debts to be paid in the first place, and subjects all his estates both real and personal to the payment of them, there is no distinction. He gives the whole to his executors; for he afterwards makes them general executors. There is no pretence for any distinction, that the Jamaica debts should affect the Jamaica property, and the English debts the property in this country. He then makes specific dispositions in favor of the mulatto woman and child; which must be admitted to be part of his Jamaica estate. The locality fixes it. Those are in the events described to become part of his residuary estate; and then he makes the residuary disposition.

What is the true construction of this will? I am bound to say, the testator has made these two persons general executors; for they have obtained probate in this country. I am also bound to say, the words "in the said island of Jamaica" must have some sense put upon them; and they must control the general words. It was contended, that they do not mean to restrain the gift to such property as he meant by what he called his property in Jamaica. The next consideration is, whether this debt under the circumstances must be [* 157] supposed to have been in his contemplation and *intention his property in Jamaica, when he made his will. It must not be forgot, that he has given to his executors only what he meant under the words "in the said island of Jamaica." The rule of evidence must be adhered to; that the *onus probandi* lies upon the executors. They claim this as a specific legacy. Therefore they must show, the testator did intend it to pass: otherwise it will not (a). It is said to stand thus;

(a) *White v. Winchester*, 6 Pick. 56. The general leaning of Courts is against making legacies specific. *Cogdel v. Cogdel*, 3 Dessaus. 373; *Walton v. Walton*, 7 Johns. Ch. 258; *Foote, Appl.* 22 Pick. 299, 302; *Briggs v. Hogford*, 22 Pick. 288, 289; *Simmons v. Vallance*, 4 Bro. C. C. (Am. ed. 1844,) 349, 350, and notes; *Bradford v. Haynes*, 20 Maine, 107; *Smith v. Lampton*, 8 Dana, 69; 2 Williams, Ex. Pt. 3, b. 3, ch. 2, § 3, (2d Am. ed.) p. 838, 840, *et seq.* The distinction between general and specific legacies is extremely important. In reference to it, see 2 Williams, Ex. *ubi supra*; *Richards v. Humphrey*, 15 Pick. 133, 135; *White v. Winchester*, 6 Pick. 48; *Washburn v. Sewall*, 4 Metcalf, 63; *Ram on Assets*, ch. 30, p. 383-386. Under what circumstances a legacy will be held a general pecuniary legacy and under what specific, see *Stafford v. Horton*, 1 Bro. C. C. (Am. ed. 1844,) 483, note (a); *Peterborough v. Mortlock*, *ib.* 567, note (a); *Ram on Assets*, ch. 30, p. 383-386; *Bradford v. Haynes*, 20 Maine, 105; *Boys v. Williams*, 2 Russ. & My. 689; *Walton v. Walton*, 7 Johns. Ch. 258; *White v. Winchester*, 6 Pick. 48; *Walker's estate*, 3 Rawle, 237.

A bequest of all the testator's right, interest, and property in thirty shares in the Bank of the United States is a specific legacy. *Walton v. Walton*, 7 Johns. Ch. 262.

A bequest of "twenty-five shares of the capital stock of the State Bank of

that it was a debt by judgments in Jamaica against William and Matthew Lewis, enforceable there only, and probably the debtors being resident there: but for some years Matthew Lewis had been removed to England; and he became, and now is a person of considerable property in this country. The testator gave his brother a letter of attorney, with full powers authorizing him to get in all debts whatsoever then due, or which should become due, to the testator in Great Britain. In prosecution of those powers an agreement took place between the testator's brother and Matthew Lewis of this nature; settling what was the money remaining due; and instead of those judgments, and as a collateral security, (for I will put it as strongly as that) and for a complete discharge, Matthew Lewis gave this bond and judgment in England, to pay by instalments; and Nisbett covenanted, that, if the instalments were so paid, no execution should be taken out either in Jamaica or elsewhere against Matthew Lewis.

This passed in 1784. It is said to have been without the authority of the testator, and not within the general power his brother had. That objection it is not competent to make now; for three years elapsed between that and the date of the will; and three payments were made under it; and it is impossible, that at the time of making the will the testator did not know the situation of that debt in England. As to Matthew Lewis, I take it for granted, there was no debt under the judgment, no breach of the condition by him. It is said so; and I will not suppose the contrary. Then at the time of making the will it must be supposed, the testator contemplates all his affairs; and has a definite meaning as to the words he uses. What can he be supposed to mean by the direction of his executors to sell and dispose of his estate, and that the money to arise by such sale, together with all other moneys belonging to his estate, or that should or might belong thereto, should be remitted to Great Britain, &c.? Did he include this debt? If he was perfectly cognizant of this transaction, did he look to the payment in Jamaica by Matthew Lewis? He knew, *it was a debt, [*158] payable by a debtor, who had removed from Jamaica; living in this country; who had given security for payment in this country accepted by his attorney, which is the same as by himself. Therefore at that time it must be supposed he looked for payment in England; and therefore this could not be part of that property, to be collected and remitted to England; and of which the execu-

North Carolina," the testator owning at that time that number of shares in the bank, was held in North Carolina, to be a general and not a specific legacy. The legacy would have been held specific if the testator had said, "my twenty-five shares," &c. *Davis v. Cain*, 1 Ired. Eq. 45. See also, *Ashburner v. Macguire*, 2 Bro. C. C. (Am. ed. 1844,) 108, and notes; 114, note (f). A testator directed all the income of twenty-seven shares in one bank, and ten and a half in another, and fifteen in an insurance company, to be appropriated towards the support of a school. When he made the will, he owned just so many shares in the two banks and in the insurance company. The legacy was held specific. *White v. Winchester*, *ubi supra*.

tors and other legatees were to have the benefit. My inclination is in favor of the legatees. But I do not see sufficient to prove, that this formed part of that specific legacy. It might be put another way. If this debt was paid under the last engagement, they could not have received it under an administration in Jamaica, nor have given the debtor a discharge. If he had complied with the obligation, they must have had an administration here. Then it would be a strong thing to say, it passed to them, when they could not by their administration in Jamaica have collected it. I must therefore over-rule the exception.

The next question is, whether, if this is the construction, to give every thing in Jamaica under this disposition, and nothing more, and this debt does not fall within that, upon what part the debts are to fall. When I decide this to be specific, the question is decided. The testator had left every thing but this specific legacy undisposed of. The executors cannot claim the residue; having equal legacies besides this specific legacy; otherwise a doubt might have arisen, whether this specific legacy would have been sufficient (1). But the other legacies, though only for rings, will do. They must be trustees of the residue; and they must pay the debts out of that before even a pecuniary legatee, much less a specific legatee can be affected (a).

Over-rule the exception. Declare, that the debts are first to be paid out of such part of the testator's personal estate as is not specifically bequeathed; and that the devise and bequest of the property in Jamaica is to be considered specific (2). The costs must come out of the residue undisposed of.

1. THAT nothing will be held a *specific* legacy or part of such specific legacy, which is not clearly proved to have been intended by the testator to pass as such; see, *ante*, note 2 to *Chaworth v. Beech*, 4 V. 555.

2. It is now well settled, that although (in conformity with the principal case) equal legacies, even for mourning, to all the executors are sufficient to turn them into trustees; *Southouse v. Bate*, 2 V. & B. 399; *Muckleston v. Brown*, 6 Ves. 64; yet unequal legacies to several executors, or a legacy to one of several, will not exclude their legal title to a beneficial interest in any residue of their testator's property, not disposed of to others; see note 5 to *Nourse v. Finch*, 1 V. 344.

3. That the residue of a testator's personal property is the proper fund to be first applied in discharge of his debts, and, generally speaking, all the costs of executing his will; see note 2 to *House v. Chapman*, 4 V. 542.

(1) See Mr. Cox's note to *Farrington v. Knightly*, 1 P. Will. 550; 2 Fonb. Tr. Eq. 127; *Bennet v. Batchelor*, 3 Bro. C. C. 28; *ante*, vol. i. 63; *Nourse v. Finch*, *Hornsby v. Finch*, 4 Bro. C. C. 239; *ante*, vol. i. 344; ii. 78; *Clennell v. Leuthwaite*, *Thornton v. Tracy*, *White v. Evans*, *Holford v. Wood*, *De Mazar v. Pybus*, *Dicks v. Lambert*, *ante*, ii. 465, 644; iv. 21, 76, 644, 725, and the note, i. 362.

(a) In Massachusetts and most, if not all of the other States, the executor is a trustee for the residue undisposed of in all cases. See *Hayes v. Jackson*, 6 Mass. 153; *Hill v. Hill*, 2 Hayw. 298; 3 Phil. Ev. (Cowen & Hill's notes,) 1495, 1496; 2 Story, Eq. Jur. § 1208; *Wilson v. Wilson*, 3 Binn. 557; S. C. 9 Serg. & Rawle, 424; *Neaves's estate*, 9 Serg. & Rawle, 186, 189, 190; 2 Williams, Executors, (2d Am. ed.) 1050, *et seq.*; 2 Story, Eq. Jur. § 1208; 2 Fonb. Eq. b. 2, ch. 5, § 3, note (k); see *Denn v. Allen*, 1 Penning. 44.

(2) For specific dispositions, see *Coleman v. Coleman*, *ante*, vol. ii. 639, and the note, 641.

MAC LEROTH v. BACON.

[ROLLS.—1799, Nov. 11, 12; DEC. 24.]

POWER attempted to be executed by invalid instruments held not executed by the general words of a will containing no reference to it. (a)
 Power to appoint for the benefit of a married woman and her family would not include the husband in general: but upon the whole will an appointment in his favor was established, [p. 158.]

THOMAS LLOYD by his will, dated the 21st of July, 1794, gave to Elizabeth Lacey Rolfe, the eldest daughter of William Rolfe, 1000*l.* for her own use. He also gave to and for the benefit of Martha, the youngest daughter of William Rolfe, the wife of Hugh Mac Leroth, a Lieutenant of Foot, the like sum of 1000*l.*; which he directed should be paid by his executors and trustees to the said William Rolfe, if living, for the use and benefit of the said Martha Mac Leroth, and to be by the said William Rolfe either settled or limited for her separate use, independent of her husband, and as a provision for her and for the benefit of her children, if the said William Rolfe shall so think fit and direct; or else, the whole or any part of it to be paid and applied for the benefit of his said daughter and her family either immediately or at any future period or periods of time, as the said William Rolfe shall think will, all circumstances considered, be most useful and beneficial to her and her family; and

(a) The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power. 4 Kent, (5th ed.) 334, 335; *Hanlope v. Gell*, 1 Russ. & Mylne, 515.

In the case of wills, it is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative, without the aid of the power. A general disposition of property by will would not necessarily include property over which the party had only a power. The will however in order to execute a power need not contain in itself express evidence of an intent to do so. Though the will does not refer to the power, it will operate as an appointment under the power, if the will can have no operation without the power. 4 Kent, (5th ed.) *ubi supra*.

If a married woman having a testamentary power of appointment makes a will, it must be intended to be an exercise of the power, although it contains no reference to it. *Churchill v. Dibben*, 9 Sim. 447; *Heyer v. Burger*, 1 Hoff. R. 2. But see where she gave all to her husband. *Lempriere v. Valpy*, 5 Sim. 108; *Lovell v. Knight*, 3 Sim. 275.

If the will does not refer to the power or to the subject of it, and if the words of the will can be satisfied without supposing an intent to execute the power, then unless such intent be clearly expressed, it is no execution of it. *Bradish v. Gibbs*, 3 Johns. Ch. 551; *Blagge v. Miles*, 1 Story, C. C. R. 426, 445. This last case contains a very full and searching examination of the cases. See also *Walker v. Mackie*, 4 Russ. 76; *Doe v. Roake*, 2 Bingh. 497; *S. C.* 6 Barn. & Cress. 720; *Roake v. Denn*, 4 Bligh, N. S. 22; *S. C.* 1 Dow. N. S. 437; Sugden, Powers, (4th Lond. ed.) 287, *et seq.*; *Davies v. Williams*, 3 Nev. & Man. 821; *Haste v. Blackman*, 6 Madd. 190; *Lownds v. Lownds*, 1 Young & Jer. 445; *Webb v. Honnor*, 1 Jac. & Walk. 352; *Hughes v. Turner*, 1 Mylne & Keen, 666; Ram on Wills § 22, p. 208-224; Wigram on Interpr. of Wills, Prop. 2 p. 18, *et seq.*; *Andrews v. Ennott*, 2 Bro. C. C. (Am. ed. 1844), 297-304, notes.

as he shall direct and appoint; and he accordingly willed, that the said Mr. Rolfe shall be at full liberty to direct the manner, in which the said sum of 1000*l.* shall be applied for the benefit of his said daughter Martha and her family; and that the same shall be paid and applied accordingly. But if the said Mr. Rolfe shall die without making such direction, then the testator willed, that the said sum of 1000*l.* shall be paid and applied in such manner as the said Martha Mac Leroth shall by any writing under her hand executed before two credible witnesses notwithstanding her coverture and without her husband's joining therein direct or appoint to be applied for the benefit of her and her family; and he willed, that the receipt of the said William Rolfe, if living, or of the person to whom he shall by writing in his life-time direct the same to be paid, expressing the same to be received by him or them for the benefit of his said daughter Martha Mac Leroth, shall be a full discharge to his trustees and executors for the said sum of 1000*l.* without their being bound to see to the application thereof in any manner. The will then proceeded thus:

“And to that end, and in order that the said Mr. Rolfe, (who best knows, what will be most beneficial for his said daughter's [* 160] *interest) may give directions, to whom he wishes the said 1000*l.* to be paid for her benefit, and in the manner, in which he wishes the same to be applied, I have wrote to him, acquainting him of this my intended legacy; and have requested him to leave directions in writing, to whom he wishes the same to be paid, and how he wishes the same to be applied; so that my trustees and executors may at every event pay and be discharged of the said legacy; and may on no account be involved in the trusts thereof, or be any ways answerable for the application or misapplication or non-application thereof.”

The testator died soon after the execution of his will.

The executors paid the legacy of 1000*l.* bequeathed in favor of Mrs. Mac Leroth, to William Rolfe; who afterwards by his will, made in 1797, revoking all other wills, gave to his daughter Elizabeth Lacey Rolfe 40*l.*: to his daughter Martha, the wife of Hugh Mac Leroth, a Captain in the 63d Regiment of Foot, the like sum of 40*l.* for her own separate use; and her receipt alone to be a sufficient discharge. Then, after giving some legacies, devising some freehold estates in trust to be sold, and making certain specific dispositions in favor of his daughter Elizabeth Lacy Rolfe, he gave to his trustees and executors, their executors, &c. all his goods, chattels, money, securities for money, credits, and all other his personal estate and effects whatsoever and wheresoever, upon trust to convert the same into money; and to pay his debts, funeral and testamentary expenses, and legacies; and he directed the residue, together with the produce of the estates directed to be sold, to be divided into two equal shares; and he gave one moiety thereof in trust for Elizabeth Lacey Rolfe, her executors, &c.; and he gave the other moiety of the said trust moneys and premises in trust during the joint lives of Hugh Mac

Leroth and Martha, his wife, to pay an annuity of 60*l.* to the separate use of the latter, with the usual directions for that purpose; and after the death of Hugh Mac Leroth in her life to pay an annuity of 100*l.* for her life to her separate use in the same manner, in lieu of the annuity of 60*l.*; and, subject to the said annuities, as to the capital in trust for all her children born or to be born equally; and in case no child shall live to attain a vested interest, in trust for Elizabeth Lacey Rolfe, her executors, &c.

The testator Rolfe died upon the 17th of June, 1798. [161] He had made a will previous to 1790; and by a codicil, executed in December in that year, he made an appointment, with reference to a former will of Lloyd giving a similar legacy in favor of Martha Mac Leroth and her family, subject to the appointment of Rolfe, in the same manner as in the will of 1794; of which legacy he had received intimation from Lloyd. He made another will in 1791; and by another codicil, dated the 8th of August, 1795, (before he received the trust money under Lloyd's will), and described as a codicil to his will, reciting Lloyd's bequest of the legacy of 1000*l.* in trust for Martha Mac Leroth and his letter to him (Rolfe) upon that subject, and also reciting a bond debt of his son-in-law Hugh Mac Leroth to him of 800*l.*, and his own will, as far as it provided, that his daughter shall not have the provision thereby made for her until her husband's debt is paid; and stating, that the discharge of that debt would be beneficial to his daughter and her family, as then his own will would immediately operate for his daughter's benefit, he directed the executors of Lloyd to pay the legacy of 1000*l.* to his own executors, for the purpose of retaining the debt of 800*l.* and the interest; and the residue he appointed for the benefit of his daughter and her children.

That codicil contained no other disposition. The Ecclesiastical Court refused to grant probate of it or of any other instrument except the will of 1797. That of 1791 was actually cancelled. The legacy of 1000*l.* was paid to Rolfe before 1797; and was by him laid out in stock; which stood in his name at his death.

Martha Mac Leroth by deed poll, dated the 15th of December, 1798, and attested by two witnesses, reciting the will of Lloyd, and her power under it, in pursuance and performance and by virtue of the power and authority, so given, granted, appointed, and directed, the said sum of 1000*l.* and all and every part thereof, and all interest and dividends thereof, to be paid, applied, and disposed of, in manner and for the purposes, and to the uses and intents following: that is to say; she appointed the sum of 800*l.*, parcel of the said sum of 1000*l.* to be paid to Hugh Mac Leroth, or to such person or persons, and in such manner, and for such purposes, as he shall think fit, and as he shall direct or order; and as to the sum of 200*l.*, residue thereof, she directed the same to be laid
* out in Government securities in the names of the said [* 162]
trustees of William Rolfe, in trust to pay the interest and
dividends thereof to her for her natural life; and after her decease

to permit Hugh Mac Leroth to receive the same, if he should survive her, for his life; and after the death of the survivor to divide the capital among all and every their child and children, in such manner as they or the survivor should by deed with two witnesses or by will to be attested in like manner, appoint; in default of appointment, equally; if but one, to that one, his or her executors, administrators, or assigns; and in case the said Hugh Mac Leroth shall not accept of, or shall not dispose of, or apply, the said sum of 800*l.* hereby given him, or shall be held or adjudged incapable of taking the same, then and in either of those cases she appointed the said sum of 800*l.*, or so much thereof as Hugh Mac Leroth shall not receive or apply, to be laid out in the public funds upon the trusts declared concerning the 200*l.*

The bill was filed by Mac Leroth and his wife against Elizabeth Lacey Rolfe, the executors and trustees of William Rolfe, and the three infant children of the Plaintiffs; praying that the Plaintiff Martha Mac Leroth may be decreed entitled to appoint the said sum of 1000*l.* for the benefit of herself and family in manner aforesaid; that the said deed and appointment executed by her may be declared valid, and carried into effect; that the sum of 1000*l.* may be raised and paid by the executors of William Rolfe, and applied according to the said appointment, or otherwise for the benefit of the Plaintiff Martha Mac Leroth and her family pursuant to the will of Lloyd; and that the will of Lloyd may be established, &c.

Mr. *Graham* and Mr. *Trower*, for the Plaintiffs, contended, that Rolfe having made no appointment, the Plaintiff was entitled to appoint this fund; and the appointment she had executed was valid within the power; and that this was not within the cases of election, much less within those of satisfaction.

Mr. *Piggott* and Mr. *Spranger*, for the Defendant Elizabeth Lacey Rolfe, insisted, that though the Spiritual Court had refused to grant probate of Rolfe's codicil, notwithstanding it related only to the trust property, not his own, yet its being called a codicil would not prevent its operating as an appointment, being a good execution within the power.

[* 163] * Secondly, they contended, that Rolfe supposing, he had made a good appointment, and having treated the trust fund as part of his own personal estate, and made his will upon that supposition, with a view of putting his daughters upon the same footing, it was a case of election (1).

Mr. *Richards* and Mr. *Short*, for the infant Children of the Plaintiffs. If Rolfe has made no appointment, the power attaches in the Plaintiff: but he executed a clear appointment in 1790. As to that made by the codicil of 1795, it is very clear, that under this power to appoint for the benefit of her and her family he could not appoint in his own favor. In a late case upon a similar trust, the trustee

(1) See the authorities upon the doctrine of election referred to, *ante*, vol. iv. 627, in the note to *Ward v. Baugh*, and the notes, i. 523, 7.

taking the fund himself in consideration of letting the man in to a share in his trade in some fish-shambles, your Honor held, that he could not do so; though it might be in some respects for the benefit of his family.

Then does the will of 1797 really appoint this fund, or not? Upon that it must be either a case of election or of satisfaction. As to the former Rolfe was then in possession of the 1000*l.*, subject to the trust. There is nothing upon the face of the will showing, he ever had it in contemplation to propose a case of election. In that it must be shown, that the testator gives that, which does not belong to him, as if it was his own. There is nothing of that sort in this case. As a satisfaction, it must be equivalent, co-extensive and commensurate, with the debt (1). The disposition by his will is inconsistent with the will of Lloyd in many respects; particularly in the gift over in default of children. It is impossible, therefore, that it can be a satisfaction.

Then as to the appointment executed by the Plaintiff, the clear intention was, that this fund should be applied for the benefit of Mrs. Mac Leroth and her children. The first part of the will shows, the testator intended it for their benefit in some shape or other. *They are first pointed out; and the word "children" [* 164] having occurred in the beginning of the will, it is impossible, that any other construction can be given to the word "family." That is also the common acceptation of the word. The husband is never treated as part of his wife's family; though she is considered part of his. But we are relieved from that difficulty by the previous use of the word "children;" and from the first part of the will it is clear, the testator did not intend, the husband should have any benefit from this fund. She is bound also to appoint the whole; and cannot make a partial appointment.

Mr. *Graham*, in reply. The case of election or satisfaction cannot arise under this will. There is clearly no reference to the power; and then according to *Andrews v. Emmot* (2) the testator shall not be considered as executing a power, where his own property satisfies the words of the will. In *Standen v. Standen* (3) the Lord Chancellor considering that rule with great attention approved it: and laid hold of the circumstance, that the testatrix disposed of real estate; having no other than the subject of the power; and therefore must have referred to the power; and in a subsequent case (4) your Honor approved that decision.

As to the appointment executed by the Plaintiff, the word "family" has various significations. The distinction attempted, that the husband is not part of the wife's family, though the converse holds,

(1) For the rules upon satisfaction see *Hinchcliff v. Hinchcliff*, and *Tolson v. Collins*, *ante*, vol. iii. 516; iv. 483; and the notes, L 112, 259.

(2) 2 Bro. C. C. 297.

(3) *Ante*, vol. ii. 589. That decree was affirmed on appeal to the House of Lords. See the note, 594.

(4) *Langham v. Nenny*, *ante*, vol. iii. 467.

can never be maintained. He is the very essence and corner-stone of the family. The word "or" in this will marks the alternative. As it was competent to Rolfe to consider, that it was for the benefit of the family to prevent Mac Leroth from going to gaol for this debt, his daughter had the same latitude.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have no doubt, except as to the last point; whether the appointment executed by the Plaintiff Martha Mac Leroth is within the scope and intention of the power; whether by the word "family" (1) the testator meant to include the husband in some circumstances, in others to exclude him; and whether it was competent to her [* 165] to include him, or not; upon which I will *consider: but as to the other points, I will lay them out of the case now.

First, as to all that passed previously to the last will of Lloyd. As to the appointment in 1790, which is now on the part of the children contended to be a valid appointment, I doubt, whether, it was possible, that he should exercise a power to attach upon any other will. But I lay that out of the case; for I am of opinion, that it is revoked. Nothing is so clear, as that this is all testamentary; the paper of 1790, as well as that of 1795. This power is created by the will made in 1794; and upon that it must rest. It is contended, that all these provisions in that will put it in her power to give it to herself; for it cannot be contended, that she might give it to her husband, and not to herself. Upon that will Rolfe acted; having plainly an intimation given to him of the will Lloyd actually made; and he proceeded to act upon it; which has totally done away every thing, that could be inferred from the appointment of 1790, referring to the will then made and any other will. Then coming to execute the power he really had, he acts upon it, reciting it accurately, by the codicil of 1795 to a will executed in 1791, which will is not produced, and the contents of which we are at a loss to know, he directs part of this legacy to be applied in satisfaction of his own debt, having annexed the condition, that she shall conform to his will. No doubt, it was perfectly competent to him to impose that condition; whether the appointment in favor of the husband was good, or not; and they must comply with the condition or forfeit their interests under the will. Then after having made that codicil, he receives from the executors of Lloyd that money; which by that codicil he had directed to be paid to his own executors. That payment made it absolutely necessary, that he should again declare his will as to this sum of trust-money. But having received the money he makes this will; which does dispose of his own estate; and makes the provision he thought fit for his two children; but takes no notice of the power: nor refers in any degree to this sum of 1000*l*. Then can I refer his last will to any supposed condition referred to in a former will, which he had either

(1) *Ante*, *Watt v. Watt*, vol. iii. 244, and the note, 247; *post*, *Barnes v. Patch*, vol. viii. 604; *Cruyns v. Colman*, ix. 319; *Wright v. Atkyns*, xvii. 255; xix. 299.

destroyed or cancelled, in a case, where he begins by expressly revoking all other wills? Then the question is only, whether this last will is an execution of the power. It has no reference to the power; and from the nature * of it can only be considered [*166] not as executing the power, but as a disposal of his own fortune. He must therefore be considered as having in his hands that sum of 1000*l.*, applicable to Lloyd's will; and as having died without executing the power in such a manner, that the Court can say, how he has done it (a).

The only remaining question is, whether Mrs. Mac Lereth has well disposed of it in the alternative, that her father has not. My inclination is in favor of what she has done. I do not like to criticise upon the word "family." In some circumstances her husband may be considered as part of her family: but it is extraordinary, if the testator meant, that she should make a present of it to her husband. He has not said, she may dispose of it in such manner as may be of benefit to her, her husband, and family. I must consider a little more of that point; being clear upon the others; that Rolfe has made no appointment; and I am very sorry, that it must be considered, that Mac Lereth's bond is an existing debt to be enforced against him. Whether he will be enabled to deduct that under this appointment of his wife, I shall take more time to consider (b).

Dec. 24th. MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I have had some doubt upon this point; and I am only anxious, that the decree shall not be supposed to be a determination, that, wherever a legacy is given to trustees, in trust, for instance, for a *feme covert* and her family, it is to be understood, that the trustees would be authorized to advance to the husband any gross part of that capital; for the construction of such a legacy, unaccompanied by any other circumstances, would be, that it should be applied for her and her children; and I desire to have it understood, that I by no means give it as my opinion, that the application of that money for the use of the husband would be within the trust. But the question in this cause depends entirely upon the meaning of the whole will as to the word "family," as there used; and upon the whole will I am satisfied, I am fulfilling the intention of the testator by the declaration I shall make. There is a clear intention, either that this legacy shall be settled upon her and her children, to be limited to her separate use, and as a provision for her and her children, and if that part of the will had taken place, no doubt, the husband could have taken no share, or in the alternative; for if that provision * does not please Rolfe, the testator gives him leave to [*167] substitute another "the whole or any part of it to be paid and applied for the benefit of his said daughter and her family:"

(a) See, *ante*, 159, note (a).

(b) See, *post*, 168, note (a).

even there it might be said to mean the same as "children" before meant: but he adds, "either immediately or at any future period or periods of time, as the said William Rolfe shall think will, all circumstances considered, be most useful and beneficial to her and her family," &c.

Upon this it is clear, he meant, either, that Rolfe might settle it upon her and her children after her, and if she had any then, they were very young, so that nothing could be then applied for their benefit, or that he was to have the power to advance any part or the whole, either immediately, or in any way he should think under the circumstances most beneficial for her and her family. He might, I think, have advanced part, to set up the husband in trade. The testator, I think, meant, he should have that power; and the word "family" as here used, was meant in a more extensive sense than children; for he had first provided for giving it to her and her children; and then the subsequent direction is to apply it, not for her and her children, but for her and her family: and then if he does not think fit to make such direction, it is to be applied in such manner as Mrs. Mac Leroth shall by any writing, &c. appoint for the benefit of her and her family. Though an appointment was intended, none was regularly made. Then it was for her to direct any part to be applied as she thought fit, not for the benefit of herself and her children, but herself and her family. The construction her father put upon it is the true construction, as the testator must have intended. Therefore desiring to be understood, that the word "family" would not include the husband, except from the context it must do so, I think, under these words it does include any means the father should think fit to advance the husband in the world; and if he did not, it gave her power to apply it for any part of her family. The letter from the testator to Rolfe, telling what he intended to do, and desiring him to leave directions, how he wishes the legacy to be applied, shows, the power is very large. The appointment made by Rolfe, prior to the death of Lloyd, I have determined to be totally void to any purpose with reference to the will, that afterwards took place; and the attempt by the codicil [* 168] of 1795 * to dispose of part was put an end to entirely by the act of receiving from the executors of Lloyd the money, and having power to dispose of it, as he thought fit. But it did not rest there; for after that, I fear, not very accurately reverting to what he had done, he made another will revoking all former wills; and the Spiritual Court have held that codicil revoked also; and therefore have not granted probate of it; and consequently I cannot read it. Then as there is an end of that codicil, and it must be laid out of the case, Rolfe died intestate as to this 1000*l.*, with that fund in his hands; and not having made any due application of it, I am of opinion, he had at his death that sum in his hands subject to the trust; and his executors are bound to apply it according to the trusts of Lloyd's will, and as if Rolfe had never acted under it. In that event, being clearly of opinion, Rolfe had it in

his power to buy a commission for the husband, to set him up in trade, or to do any act for the benefit of him, and her, and their children, and not having done so, the question is, what was her power? The will in creating her power does not go back to direct an application to her separate use and for the benefit of her and her children: but it is to be for the benefit of her and her family, either then, or at any future period. She might have bought a house to have set her husband up in trade, or have applied it in any way to conduce to the benefit, not only of herself and her children, but, as Rolfe might have done, for any part of her family. She has appointed 800*l.* for the benefit of her husband. If she might set him up in trade, she might give it to him to apply it.

Therefore, not without some doubt, but, I think, upon the true construction of this will, not wishing to have it understood, that in any other case differently circumstanced the word "family" shall be held to mean the husband, I am of opinion, the Plaintiff Martha Mac Leroth had full power to appoint this fund for the benefit of her husband; and the appointment she has executed must be declared valid (a).

1. THAT an express recital of a power is not necessary to enable a testator to dispose, by will, of the subject of the power; see, *ante*, note 5 to *Blake v. Bunbury*, 1 V. 194. As to the extent to which Courts of Equity will go in aiding imperfect executions of power; see the notes to *Bull v. Vardy*, 1 V. 270. And that a general devise, where the testator had no lands whatever of his own, may, in order to prevent the will from being nugatory, pass lands over which he had merely a power of disposition; though it is by no means to be understood, that, in every case, words which are sufficient to give a person's own property, are also sufficient to give property over which he has a power of appointment; see note 4 to *Standen v. Standen*, 2 V. 589.

2. It is only in cases (like the present) where the ordinary construction is controlled by the context of a will, that the word "family" is held applicable to persons not within the Statute of Distributions, at least, when the will is to be executed by the Court; see note 5 to *Brown v. Higgs*, 4 V. 708.

(a) The acceptance of the term "family" may be narrowed or enlarged by the context of the will, so as in some instances to mean children, or in others, heirs, or it may even include relations by marriage. See 2 Williams, Executors, (2d Am. ed.) 818, 819; *Blackwell v. Bull*, 1 Keen, 176; *Woods v. Woods*, 1 Mylne & Craig, 401; *Doe v. Flenning*, 2 Cr. Mees. & Ros. 638; Sugden on Powers, (4th Lond. ed.) 525.

SAYERS, *Ex parte*.

[1800, JAN. 22.]

A. ABROAD commissions B, in London, to send him foreign coin; with particular directions as to the manner and times of sending it; and remits bills; which B. discounts; and the coin required not being to be had in England, sends two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it: with directions, if it cannot be had, to return bills. The coin not being to be had, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, are returned; and, B. in the interval becoming bankrupt, are received by his assignees. A. was held to have a lien upon those bills upon the particular circumstances: the Lord Chancellor expressing much doubt, whether the lien would hold in the case of a remittance to buy goods in the way of trade. (a)

THE petitioner, paymaster of the forces in the island of Dominica, wrote to the house of Cheap and Laughnam in London to procure and send out to him foreign coin, half joes and dollars; with directions to send him to the amount of 5000*l.* at one time, 5000*l.* at another, and the same sum by every succeeding opportunity by the packet or otherwise. He soon afterwards inclosed them two bills upon the Paymaster General for 10,000*l.* and 6000*l.* for which he desired them to give him credit; and he drew upon them for above 2000*l.*

Cheap and Laughnam having discounted the bills, received from the petitioner, and the coin required not being to be procured in England, remitted 5600*l.* to Peter and Co. at Lisbon; with directions to purchase joes, and if they could not procure them, to return the money in good bills; and at the same time wrote to the petitioner, that they had made a remittance to Lisbon for the purpose of procuring the coin. About a month afterwards Cheap and Laughnam made another remittance to Lisbon to the same amount; with directions to send joes and dollars, or, if they were not to be procured, good bills; but soon afterwards they countermanded the order as to the dollars; desiring only joes. The answer from Lisbon was, that it was impossible to procure joes; and that at all events they could not send more than half in coin; being obliged by a regulation of Government to take part in Government paper. Soon afterwards they sent good bills, but not indorsed by them, for very near the amount of the remittance. In the interval Cheap and Laughman having become bankrupts, those bills got into the hands of their assignees.

The petition claimed these bills as the specific property of the petitioner.

The *Solicitor General*, [Sir William Grant], in support of the petition. It is not necessary to show, that the identical bank-notes and guineas, for which the bankrupts discounted the bills,

(a) See Story, Agency, § 228, and notes; *Coddington v. Bay*, 5 Johns. Ch. 54; S. C. 20 Johns. 637.

were remitted to Lisbon, and produced the bills in question. If the foreign coin had arrived in England after the bankruptcy, it would have belonged to the petitioner. Then are not these bills in just the same situation? The difference in the amount of the return from Lisbon probably proceeded from the exchange.

The *Attorney General*, [Sir John Mitford], and Mr. *Mansfield*, for the Assignees under the Commission. If the bills remitted to London by the petitioner had remained in the possession of the bankrupts at the time of the bankruptcy, they would have had them upon a specific trust; which would have bound the assignees. But that is not the state of this case; for previously to the bankruptcy they had discounted those bills; then they remit 5600*l.* to Lisbon in bills, which they purchased in London. They do that out of the general cash of the house. It may be what they receive for the discount of those bills: but the moment they were discounted, and the produce came to the hands of the bankrupts, their situation was, that they were debtors to the petitioner for the sum received for them; and then he could only prove under the commission in respect of that. Then has any thing been done, constituting that fund a specific property, that did not pass by the assignment, but was the petitioner's property in the hands of the bankrupts under a trust? Suppose, the bills remitted to Lisbon had been bad: how would they have been the petitioner's loss? If the joes had been actually purchased, being purchased for the petitioner those specific joes might have been his property. So they might have been, if the bankrupts had not a shilling of the petitioner's in their hands; but the joes not being purchased, but bills being remitted to the bankrupts in consequence of the remittance by them to Lisbon, what can give the petitioner a greater lien upon those bills and that sum of 5600*l.*, part of the produce of the bills discounted, than the rest of those bills. The remittance to Lisbon did not alter the property at all. The fund remained the property of the bankrupts just as before. Suppose a general debt; that upon a balance of accounts the bankrupts had been indebted to the petitioner in 10,000*l.*; and he had desired them to purchase joes; and then this transaction had taken place: Could he claim a lien upon the bills returned? What is the difference? The bills remitted for a particular purpose they have converted into a general debt; and then this transaction took place. The principle applies to cases, * where specific effects come to [* 171] the hands of the assignees; which must be subject to the trusts upon which the bankrupts held them: but a debt due from the bankrupts cannot be considered as held upon a trust. They are debtors; and responsible as such, if they do not do what was required. There would be no end of such liens, if all sums remitted to traders are to be pursued through every possible transaction. It would go to a great extent. It might as well be contended against a banker, who had received a sum of money from a particular customer to keep. It is an unfortunate case, where a person has sold goods to the bankrupt; who receives money for them: but there is

no pretence in that case for a lien. In the bankruptcy of *Cox and Heisch* a person had engaged with them in an adventure by a remittance to Petersburg; in which his interest was one fourth. Upon a remittance of bills from Petersburg on that account Cox and Heisch discounted them; and, knowing they were responsible for one fourth, they put aside a sum, rather more than that; meaning to pay it to that person: but upon a considerable bankruptcy in the mean time finding they must fail they suspended the actual payment: but the sum appropriated was clearly distinguishable in bank notes. Upon petition for these notes and some others, which were clearly specific, your Lordship thought the petitioner entitled to the latter, but not to the notes, which it was the intention of the bankrupts to pay to him in respect of his fourth of the adventure: but they were considered mere debtors to him for that sum. So in this case, when the bills were discounted, they became debtors to the petitioner for the money received upon them; and nothing, that passed afterwards, can make any bills, particularly these bills, the specific property of the petitioner. If the bills they got had proved bad, they must have taken the consequence. Whether they had a right to charge him with any loss by interest, &c. in the course of exchange, is a different question. If without any remittance he had directed them to make the purchase, and they had tried, but could not, they might perhaps have a right to charge him with the expense: but he would not be responsible for the goodness of the bills. Besides, the remittance by the petitioner was not upon a special trust, but remitted upon his general account. He desires them to give him credit for the bills; and he draws upon them. That money was not distinguished in their hands from any of their other money; and it was indifferent, with what money or bills the joes were bought. There was no appropriation.

[* 172] * Lord CHANCELLOR [LOUGHBOROUGH]. It strikes me, that the case of a lien is very distinguishable from the case cited of the Russian adventure; in which there never was any severance from the general property of the bankrupts.

I take it to be clear upon the correspondence in this case, that the money was sent for a particular purpose; for the purpose of procuring foreign coin. The first letter distinctly marks the order to send 5000*l.* at one time, 5000*l.* at another, and the same sum by every opportunity by the packet or otherwise. He remits bills upon the Paymaster General. Then what is done? The order not being to be executed in London, they proceed to execute the trust by sending to Lisbon, perhaps out of the very money received upon those bills, but out of their funds, having received the bills, for the purpose, it is expressly declared in their correspondence, of making the purchase. It is admitted, very properly, that if joes had been returned, the petitioner would have a right to them, as purchased by his order with money remitted by him for that purpose. It does not remain a general debt; they proceeding to execute the trust by doing all, that was in their power. The thing was not to be bought

here. They send to Lisbon. Suppose, the petitioner had gone to Lisbon: he might have stopped the execution of the commission; saying, he did not want the foreign coin, but would take it in bills or any other way. Suppose, it could have been done by the purchase of joes, but Peter and Co. had purchased some other coin: the petitioner might have affirmed or dis-affirmed it. But what has happened? Joes not being to be found these bills are sent. The petitioner might, if he had gone to London, have gone to them, and said, he would take the bills. It would be a narrow rule to hold, that, the commission being in train to be executed, the property, being separated and severed property by the accident, that the joes were not bought, should be lost to the owner. I am inclined therefore to allow the lien in this case, and to direct the assignees to deliver over the bills. It is a particular case; and different from any, that has occurred.

For the Assignees. It is a very important point. The money got into the general fund. Suppose money had been sent for the purpose of buying goods?

**LORD CHANCELLOR.* [LOUGHBOROUGH]. I doubt much [* 173] whether it would apply to that case of buying goods. There is a great deal of traffic and exchange there.

I feel, there is a considerable degree of singularity in this case; and if you wish it, I will consider farther of it. It is a very hard case. It is very fit for the consideration of the creditors too; for it is clear, the fund is increased by this sum of 16,000*l.* If it got into the general fund, it got out again. It acquires an identity and a distinction from all the rest of the fund by the application of it, by sending it to Portugal.

The bills having been paid, the order was made for payment of the money to the petitioner: the point not being farther pressed by the assignees.

1. *BILLS* and notes of a principal in the hands of a factor, remain the property of the former, unless there is a special bargain between the parties to the contrary. A similar principle is applied to dealings between customer and banker: upon the death, or failure, of a banker, his customer has a right to the bills by him deposited, and not sent on a general account, so long as they remain in specie; and they do not go to the executors or administrators of the banker in the one case, or to his assignees in the other. *Thompson v. Giles*, 3 Dow & Ry. 743. So, when bills are sent by a foreign correspondent to a merchant here, to be received, and the money to be applied to a particular use; should the merchant become bankrupt before the money is received on the bills, the correspondent has a special *lien* in respect of those bills, and the money is not to be divided among the creditors at large: *Ex parte Oursell*, Ambl. 297; *Ex parte Pease*, 19 Ves. 44; *Bent v. Philler*, 5 T. R. 496: but although bills undue, or remitted for a particular purpose to a banker, are held in trust, and the remitter has a *lien* thereon, so long as they remain in the banker's own hands; yet, if such bills are sent indorsed, the banker may discount, sell, or pledge them: such acts would, no doubt, be a breach of trust, which it would be desirable to restrain; but, if the remitter of the bills could follow them into the hands of other holders for good consideration, the negotiation of bills, necessary for the purposes of commerce, would be at a stand. *Collins v. Martin*, 1 Bos. & Pull. 651; *Ex parte Treogood*, 19 Ves.

232. It is quite clear, that short bills, in the possession of bankers, are to be considered as still remaining in the possession of the customers, by their agents, and, on failure of the bankers, the bills must be specifically returned, unless there was an agreement, either express, or plainly to be inferred from the dealings between the parties, that the bills were to be considered as cash; *Ex parte Sargeant*, 1 Rose, 154; and although the bills may have been due before the bankruptcy of the agent to whom they were consigned, yet, if he has not received their amount, the remitter has a right to the bills, if they are good, though he has also a right to say, the bankrupt, by keeping the bills after they were due, has so far made them his own, that, if they prove good for nothing, he, the remitter, may renounce them, and go against the bankrupt's estate. *Ex parte Sollers*, 18 Ves. 230. Bills remitted to a banker and with power to discount, even for general purposes, if they are not actually discounted before the banker fails, remain the property of the remitter. *Ex parte The Leeds Bank, in re Boldero*, 19 Ves. 60.

2. We have seen above that short bills, in the hands of a banker, are specifically the property of the remitter, but it must be distinctly understood, they remain subject to the balance of the account between the parties, and to any acceptances which the bankrupt has given on the strength of such bills; *Ex parte Routon*, 17 Ves. 421; *Giles v. Perkins*, 9 East, 14; *Ex parte Waring*, 19 Ves. 349; and though short bills, and bills sent for a particular purpose, are to be returned on bankruptcy, it does not follow that all bills due, and sent on general account, are also to be returned. *Ex parte M'Gae*, 19 Ves. 610.

3. The distinction between goods consigned to a factor, (*Ex parte Dumas*, 1 Atk. 233,) or bills sent to a banker, and cash, is, that the latter cannot, except in very rare instances, be identified. Trover may be brought for bills; but cash, generally speaking, has no "ear-mark:" *Ex parte M'Gae*, 19 Ves. 611: the principal case, however, is an authority, that although bills sent for a particular purpose may have been discounted, yet, if the proceeds can be specifically traced into other bills, remaining in the agent's hands when he becomes bankrupt, the bills so identified in substance, though commuted in form, will still be impressed with a *lien* in favor of the remitter; see, *post*, the note to *Hassall v. Smithers*, 12 V. 119.

THE EAST INDIA COMPANY v. NEAVE.

[1800, JAN. 29, 31.]

BILL by the East India Company, claiming from a part-owner of a ship, freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charter party and a by-law to the Company, one moiety to their use, the other to be paid or returned to the person, who shall give the Company information and make proof: the deed being on settling the account cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject the Defendant to penalty, covering, not only the direct charge, but also circumstances of mere inducement, as, the execution and cancellation of the deed, and to the relief, generally, for want of equity, and for defect of parties, namely, the other part-owners, particularly one, who executed, and the informer, was over-ruled.

The command of an East India ship is a public trust; and the sale of it contrary to a public regulation of the Company is a breach of public duty, [p. 181.] Demurrer both to the discovery and relief, if good as to the latter, shall be allowed as to both; though the Plaintiff may be entitled to the discovery, (a) [p. 184.]

THE bill stated, that the Plaintiffs are entitled to the exclusive trade to the East Indies; which trade they have carried on in ships

(a) See Story, Eq. Pl. § 312, and notes; *Fry v. Penn*, 2 Bro. C. C. (Am. ed. 1844,) 282, note (a); *Price v. James*, ib. 319. The rule formerly adopted in

built and equipped for their service, and let to freight to them under charter-parties by the owners from voyage to voyage ; and the Plaintiffs have stipulated with the owners, that they should be commanded and officered by persons regularly brought up and having served on board such ships ; and such commanders have, or ought always to have, devoted themselves entirely to such service, and while they remained therein never to have employed themselves in any other way.

The bill then stated, that the Plaintiffs having experienced great inconvenience, and great oppression having been exercised towards the commanders and officers in their marine service, from the practice of the owners of such ships selling the commands and offices on board them, and likewise by the sales of commands * by [*174] one commander to another, the Plaintiffs have long since according to the powers vested in them for that purpose made certain by-laws for the prevention of such practices ; and in the charter-parties which have been made from time to time by the owners to the Plaintiffs, the Plaintiffs have in pursuance of such by-laws required the owners and commanders, parties thereto, to enter into a covenant not to sell or dispose of the command or any other office on board the different ships for any pecuniary compensation, gratuity, or reward, whatsoever. In October, 1782, the Defendant and William Wells were owners or part-owners of the Glatton, then about to be employed in the Plaintiff's service ; and the Defendants appointed Charles Drummond to the command of her : but previously to such appointment and upon the treaty between the Defendant and Wells touching the same, the Defendant, who was the chief acting part-owner required, that Drummond should pay or give the Defendant for his own use some pecuniary compensation, &c. for the said appointment ; though he did not specify the direct amount ; and Drummond being unable to obtain the command without yielding to the terms proposed by the Defendant did agree to pay or give him some pecuniary compensation, &c. for such command ; and thereupon Drummond was appointed, and sworn in, to the command.

The bill farther stated, that, the Glatton having been taken to

England was different ; it was, that if a bill was for discovery and relief, and it was good for discovery only, a general demurrer to the whole bill was bad. *Brandon v. Sands*, ante, 2 V. 514. In New York, this old English rule is adhered to. See *Laight v. Morgan*, 1 Johns. Cas. 429 ; *S. C.* 2 Cain. Cas. in Err. 344 ; *Kimberly v. Sells*, 3 Johns. Ch. 467 ; *Brandon v. Sands*, ante, 2 V. 514, note (b), and cases cited.

So in Massachusetts it is held, that a general demurrer to the whole bill, if there is any part, either as to relief or discovery, to which the defendant ought to put in an answer, the demurrer being entire ought to be over-ruled. *Wright v. Dame*, 1 Metcalf, 237. See also 1 Harr. Ch. Pr. (7th ed.) 414 ; *Wigram, Discovery*, Pl. 40, 62, et seq. ; (1st Am. ed.) p. 21, 31.

But where a bill seeks general and special relief, and also a discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill. *Pool v. Lloyd*, 5 Metcalf, 525.

freight by the Plaintiffs upon a voyage to the East Indies and back, a deed or charter-party, dated the 30th of October, 1782, was executed between the Defendant and Wells, therein described as part-owners of the Ship, and Drummond, of the one part, and the Plaintiffs of the other part; whereby the ship was hired to freight to the Plaintiffs for the voyage; and in such charter-party was contained a covenant on the part of the Defendant, and Wells, and Drummond, jointly and severally, that neither the said master nor the master for the time being or part-owners or any other part-owners of the said ship shall or will sell, or wittingly or willingly permit or suffer any other person to sell, to the master or any other officer of the said ship his or their place or places, office or offices; nor shall or will take, execute, have, or receive, any money or gratuity, or any promise, agreement, service, or reward, whatsoever, directly or indirectly, for or in respect of any place or office in or belonging to the said ship, or for admitting any officer or

[* 175] * officers or any other person or persons to go in said ship; and in case said part-owners or any of them or the master for the time being shall offend against the true tenor or meaning hereof, the said part-owners and master shall pay, or, as aforesaid, allow, to the said United Company double the sum, for which any place or places, office or offices, &c. shall be sold or disposed of; one moiety whereof shall be to the use of the said Company; and the other moiety to be paid or returned to such person or persons, who shall give the Company a due and true information thereof, and make proof of the same.

The bill proceeded to state, that all the accounts relative to the freight, demurrage, and earnings, of the ship were upon her return from the voyage settled between the Plaintiffs and the Defendant and Wells; and all the money due to them was discharged by the Plaintiffs; who not having any notice or suspicion or any reason to suspect, that any of the covenants, particularly that as to the sale of the command, &c. had been broken, delivered up such charter-party to one of them to be cancelled: but since, about the end of the year 1798, the Plaintiffs have discovered, that the Defendant did, after the ship had sailed, and while she was on the voyage, actually receive from Drummond and Co., bankers of Charles Drummond, 3500*l.* as a compensation for the said appointment, and 181*l.* 1*s.* for interest, in violation of the covenant in the charter-party.

The bill charged, that Drummond previously to his appointment agreed to pay the Defendant the said 3500*l.* or some other considerable sum as a recompense, &c. for, or on account of, the appointment; and the Defendant, knowing, that taking such money would be a direct breach of the covenant, forbore taking it directly from Drummond; and with a view to conceal the real transaction, and to make it appear, that the said money was paid to him on some other account, he suffered it to remain a considerable time after the ship had sailed, and then in pursuance of some stipulation or understanding between him and Drummond, or his bankers, or

his attorneys or agents, called upon Drummond and Co. for the said 3500*l.* and interest; which they paid accordingly; and which he accepted for or in respect of the command or some office in the ship. It was also charged, that several letters and conversations * passed between the Defendants and the bankers [*176] and agents of Drummond on the subject.

Then, in answer to suggestions of a pretence, that the Plaintiffs had recognized the practice, and agreed not to call upon the parties for any breach in respect thereof, and in order to put an end to it without injustice to the commanders, had agreed to give to commanders, who in certain cases had purchased their commands, certain compensations in lieu of being permitted to sell them, the Plaintiffs charged, that though notwithstanding the engagement entered into by the commanders it was notorious, that most of them did purchase their commands, it was held out to the Plaintiffs, that such commands were sold by one commander to another; and the owners, and particularly the managing owners always disclaimed and disavowed, that they ever reaped or partook of any advantage whatsoever by reason of the appointment to commands or any other offices; and the resolutions, which the Plaintiffs have come to in respect of the indemnity to be given by them to commanders, who had purchased their commands, were never intended nor understood to extend to operate as an acquittance and discharge to any managing owners or other owners of ships or vessels in the Plaintiffs' service, who had been guilty of oppression to their commanders and officers in appointing them; but merely to commanders, who had purchased their commands. As evidence, that these resolutions were never understood to acquit owners from responsibility for the violation of the covenant, the Plaintiffs charged and stated a letter, dated the 20th of April, 1796, from most of the managing owners to the Court of Directors, stating, that insinuations had been cast upon the ship-owners with regard to the sales of appointments, and declaring individually, that such insinuations were highly injurious to their characters; and declaring upon their honor, that they never have, directly or indirectly, received any pecuniary benefit whatsoever as managing owners from the appointment to any command.

The bill farther charged, that the Defendant was privy to that letter; and it was meant and considered by the persons, who signed it on behalf of themselves and the other managing owners, that the owners did not consider themselves entitled to the sale of the commands or offices. But the Plaintiffs did not know any * thing of the sale of the command by the Defendant to [*177] Drummond, until after the charter-party was delivered up; and it was in the investigation to ascertain, whether Drummond was entitled to compensation for not being permitted to sell, that the Plaintiffs became acquainted with the facts before stated.

The bill prayed a discovery; and that the Defendant may be de-

creed to pay to the Plaintiffs double the several sums of 3500*l.* and 181*l.* 1*s.*, so received by him, making together 7362*l.* 2*s.*

As to so much of the bill as requires the Defendant to answer and set forth, whether he did not require and insist, that Drummond should pay or give to him for his own use and benefit some and what pecuniary compensation, gratuity, or reward, for his appointment to the command, and whether he was not unable to obtain the command without yielding to the terms proposed by the Defendant, and whether he did not agree to pay or give to the Defendant some and what pecuniary or other compensation, &c. and to set forth the full particulars of the contract, and the terms and conditions, upon or under which Drummond was appointed to the command, and what benefit, interest, advantage, or profit, the Defendant derived, obtained or received, therefrom; and how and when he derived, &c. the same, and all that passed between him and any other person or persons and Drummond relative to his appointment, and whether such deed of charter-party, of such date, and containing such covenants, as in the bill mentioned, or some and what charter-party, &c., to the effect therein mentioned, was not entered into and executed by the Defendant and Wells, or one of them, and whether the Defendant or some other person or persons and who, did not, after the ship had sailed, and while in the prosecution of her voyage, receive from Drummond and Co. or from some other person or persons and whom, 3500*l.* or some and what sum, as a compensation &c. and 181*l.* 1*s.* or some and what sum for interest, and whether by the receipt of the said sums the Defendant did not act in violation of the covenants, &c. and did not become liable to answer double the said sums, and whether he did not for the reasons in the bill or for some and what reasons forbear taking the said money directly, and did not with such view as in bill or some and what view suffer the same to remain a considerable time after the ship had sailed, and afterwards under some stipulation call upon Drummond and Co. for

[* 178] * the said sum and the interest, and whether some and what letters, notes, and conversations, passed upon the subject, and to set forth the particulars of such conversations, and whether the Defendant or some person or persons for his use have or had not some written correspondence of his, and to set forth and produce the same, and whether an account between Charles Drummond and Drummond and Co. touching the said money, was not kept separate and under the head of "The ship Glatton," and whether any and what dealings and transactions ever and when took place between Charles Drummond and the Defendant other than what related to the said ship, and an account of all dealings and transactions between them relating to the said 3500*l.*, and how and when it became due, and whether the Defendant did not make some entries and memorandums concerning the same, &c. and to set forth and produce such entries, &c. the Defendant demurred, for cause, that it appears upon the face of the bill, that the discovery of the several matters and things aforesaid would or might subject or make him liable to some penalty or penalties.

As to all the relief prayed the Defendant demurred, for cause, that the Plaintiffs have not by their bill made such a case as ought to entitle them to such relief; and for farther cause, that the bill is insufficient to answer the purposes of complete justice; as it thereby appears, that William Wells and several other persons, who were part-owners of the ship, are interested in the matters in question in this suit; and it thereby also appears, that the person or persons, who discovered or gave information to the Plaintiffs of the pretended payment to the Defendant, have also an interest in the same: and they are not parties.

The Defendant answered so much of the bill as was not demurred to; admitting the Plaintiffs exclusive trade, &c.; that the Defendant and Wells were part-owners of the ship; the appointment, and other facts. He stated that there were several other part-owners; but admitted, he was the chief acting part-owner. He stated, that previously to the voyage, but when in particular he cannot recollect, William Wells and John Wells, then a part-owner, but since deceased, or one of them, with the approbation of the Defendant, the husband or agent of the ship, agreed to appoint Drummond to the command; denying, that he had any concern in the original agreement farther than approving the appointment. He *stated, that he has been informed and believes, several [*179] of the managing owners authorized such letter as stated in the bill, but whether voluntarily and without being invited, he cannot set forth; and he denied to the best of his recollection and belief, that he was privy to that letter.

The *Solicitor General*, [Sir William Grant], Mr. Romilly, and Mr. Whishaw, in support of the Demurrer. As to the discovery, the only question is, whether this is to be considered a penalty. It may perhaps be contended to be, not a penalty, but a stipulated compensation by way of damages to be paid to the Plaintiffs: but it is clearly a penalty, and not in the nature of stipulated damages. The payment is to be double the sum, for which the office is disposed of, not to the specific use of the Company, but half to go to the informer. That circumstance alone decides this to be mere penalty and forfeiture. Besides the phrase in the charter-party, following up the by-law, is, if any of the parties shall offend. It is not like a covenant against digging gravel or ploughing up meadow land, and a stipulation to pay so much a load or an acre for every load dug or acre ploughed. That is in the nature of compensation: but this has no reference to the degree of damage sustained. The nature of the damage sustained must be in proportion to the greater risk the cargo runs; and the sum received by the ship-owner would be the natural measure of the injury: but this is perfectly arbitrary. Liquidated damages must be paid to the person damaged. How is the informer damaged? That circumstance also, that he is to have this sum, fixes upon it the character of penalty. The bill proceeds throughout upon its being a penalty; adopting the word "offend." It does not state, that the Company themselves experienced any

damage or loss from this practice ; nor, that this stipulation was necessary to make them compensation : but the statement is, that the oppression to the commanders and officers from this practice was the reason of the by-law and covenant.

The law of the Court upon this subject is stated in a book of great authority (1). If that is correct, how can this discovery as to the deed be compelled ; for the Plaintiffs profess, that [* 180] their only object is to recover the penalty. *In *The East India Company v. Campbell* (2) the doctrine of the Court goes much farther, to show, that the circumstances need not be answered. *Honeywood v. Selwin* (3). In *The Attorney General v. Colman*, in the Court of Exchequer in the time of Chief Baron Eyre, a bill was filed, stating, that the Defendant, an iron merchant, had not fully accounted for the duty of all iron imported. The answer stated, that a criminal information had been filed against the Defendant for having imported a great quantity of iron without paying duty, and having bribed a Custom-house officer : and that as that information was depending, and the discovery prayed might be made use of against the Defendant in that cause, he ought not to be compelled to make it. The Court were of that opinion ; and did not compel him to put in his answer ; and the Attorney General entered a *Noli Prosequi*.

As to the demurrer to the relief, the persons entitled to half the penalty are not made parties : neither are the other part-owners of the ship. The persons liable to pay are not merely those part-owners, who shall have executed the charter-party. At least Wells, who according to the bill did execute it, ought to be a party. Nor are the persons stated to be injured before the Court.

The *Attorney General*, [Sir John Mitford], Mr. Mansfield, Mr. Rous, and Mr. Stratford, for the Plaintiffs. As to the discovery, it is impossible to sustain the demurrer, upon a very simple ground ; for it goes to the existence of the charter-party. It has been repeatedly determined, that though a tenant for life may demur to a discovery of waste, unless the forfeiture is waived, he cannot to the discovery, whether he is tenant for life. The demurrer is infinitely too extensive in that respect. It extends also to the discovery, whether the charter-party was not cancelled under the circumstances stated in the bill. But upon principle also the ground of this demurrer fails : namely, that this is a bill seeking a discovery of what will subject the Defendant to a penalty. The rule of the Court upon that is not in a proceeding in Equity to compel a discovery, first, of any thing, that will make the Defendant liable to a criminal prosecution ; next, of any criminal act, the effect of which will be a forfeiture of an interest he has in a certain thing. This [* 181] question is simply, whether the Defendant shall *perform his contract. In articles of partnership by the terms of

(1) Mitf. Plead. 157.

(2) 1 Ves. 246.

(3) 3 Atk. 276.

them the sum is an actual penalty, applied to the breach of those articles : but it never was conceived, that such a defence could hold. It is his own agreement, and exactly the same case as those alluded to of digging gravel, &c. contrary to covenant. *Brodrepp v. Cole*, before Lord Thurlow (1) was a case of that kind. It came on, first, upon a demurrer ; and afterwards a decree was made. There was an express covenant not to dig : with a proviso, as in this instance, that if he did, he should pay to the lessor 20s. a cart-load. The cases cited are cases of strict penalty by the public law. In *Honeywood v. Schryn* the Defendant would have been liable to lose his seat in Parliament. He would at least have been called upon to show some evidence as to what passed between him and his trustee, that the circumstances were altered. As to *The Attorney General v. Colman*, the discovery would have been strong evidence against the Defendant in the criminal prosecution instituted against him. *Roy v. The Duke of Beaufort* (2) was a strong case certainly. It was penalty in every sense, except, that it was not for a crime. The circumstances of the execution and cancellation of the deed do not go the least way to prove the fact imputed. The motive of the Company was to redress a practice, by which persons giving high prices for their offices might become desperate in their circumstances, and unfit to be trusted in this situation. This is not a public trust, but the command of a ship of trade.

LORD CHANCELLOR [LOUGHBOROUGH]. Is it not a public trust : the command of a ship of the Company, who alone have a right to trade to India ? The selling that contrary to a public regulation of the Company is a public act, and a breach of a public duty (3).

For the Plaintiffs. As to the relief, the Plaintiffs are clearly entitled to relief, so far, at least as to have the benefit of the instrument at law, as if it had not been cancelled ; the cancellation having taken place under these circumstances. It is like the case of the loss of a deed. The covenant is joint and several ; and the provision is, in case the part-owners or any of them shall offend. The demand is made with most propriety against the person actually receiving the money. With respect to the informer, the action is given to the Company solely. No person can be entitled under that part of the clause until actual * recovery in the [* 182] action. The informer can have no interest until proof made, and it is established, that the penalty is due. There is nothing requiring the informer to institute the suit ; nor could he. The covenant being with the Company, the action must be by them. It is not a covenant to pay to any informer or third person. The expression, that a moiety is to be paid or returned to the persons giving information, imports, that the money is to be in the Plaintiff's hands, before it is to go to any informer. It is certainly absurd to suffer

(1) In Hilary Vacation, 1779, stated in Mitf. Plead. 158.

(2) 9 Atk. 190.

(3) *Ante*, *Hartwell v. Hartwell*, vol. iv. 811, and the note, 816.

this to stand in the covenant: but it is only following the by-law; and the only effect of it is a declaration from themselves as to the disposition of the money, when recovered.

The *Solicitor General*, [Sir *William Grant*], in reply. No punishment is now necessary to prevent this practice; which is completely put an end to (1). That therefore cannot be alleged to be the motive of the bill. The argument, that it never can be construed to be penalty, where it can be shown to be for the performance of a contract, would put an end to many cases of forfeiture, &c., by private agreement; and also the cases, where the Court has relieved against penalties under private agreements for performing contracts. Every clause of forfeiture introduced into a lease is only for insuring performance of the covenants. The covenant not to assign without license, with a clause of forfeiture, is only to compel the tenant not to assign: but, if the object is forfeiture, he cannot be compelled to discover, whether he has assigned or not. The cases, where the question has been, whether the Court would relieve against the forfeiture, are not applicable to this case. That was the point in *Roy v. The Duke of Beaufort*: but the consideration applicable to this question is, whether the Court would have compelled the Plaintiff there to have discovered, whether he had angled. In *Sloman v. Walter* (2) the penalty was considered as being only to insure performance of a contract; and Lord Thurlow relieved; and the same thing was done by the Lords Commissioners in *Hardy v. Martin* (3). According to this doctrine those were cases of stipulated damages; but the Court considered them as in the nature of a penalty; and therefore the real damage was to be ascertained; and would not upon a mere bill of discovery in order to charge the Defendant with

a breach have compelled it. In the cases of ploughing up [* 183] *land or digging gravel, &c. contrary to covenant, the

Court holds it to be an agreement for that precise sum, to be taken as conclusive evidence of the damage. Suppose the agreement to be to pay a sum of 500*l.*: not with a reference to the price per acre or per load. That distinction is expressly stated by Lord Mansfield (4). This shows, compensation was not in view of these parties: otherwise they would have found some other measure. They complain, not that the effect of the practice is to introduce improper commanders and officers, but to oppress proper commanders and officers. The object was to protect them, not the Company.

If the Defendant is not bound to answer the principal charge, he need not answer the circumstances, the component parts of the charge, the whole of which would make him liable. In the case of a forfeiture of a portion by a marriage without consent, even the simple fact of marriage need not be answered: *Chauncey v. Tahour-*

(1) It was determined to be illegal in *Blachford v. Preston*, 8 Term Rep. B. R. 89.

(2) 1 Bro. C. C. 418.

(3) 1 Bro. C. C. 419, n.

(4) 4 Burr. 2228, in *Lowe v. Peers*.

den (1). So in *Baker v. Pritchard* (2) Lord Hardwicke not only protected the Defendant from the question, whether she procured the subornation of perjury, to which the demurrer was of course, but also from the discovery, whether the verdict was not obtained principally upon the evidence of the witness said to be suborned; considering it as part of the same charge, and that it was extremely difficult to disconnect the one from the other. The same principle prevailed in *The Attorney General v. Colman*. The question would have affected the Defendant in a criminal manner by furnishing evidence against him in the other suit depending: Lord Chief Baron Eyre said, he knew of no rule more universal, than that you shall not compel a man to answer to what will in any way subject him to penalty: otherwise any thing might be got from him by a little management in drawing the bill. This case is stronger: the declared purpose of the bill being the penalty.

Upon the objection to the relief for the want of parties, when they observe, that the covenant is joint and several, they forget they are in a Court of Equity. Wells particularly, who executed the charter-party, is liable. The objection as to the informer is, that *non constat* there is one, or that he will ever be entitled. Then the Plaintiffs have no right to the whole penalty. The person, who has given them the information, will at least have a right to sue, if *he puts them in the way, and furnishes them with the [* 184] proof. He ought at least to be before the Court to lay in his claim. As to one moiety the Plaintiffs are merely trustees; and the *cestui que trust* ought to be before the Court. In many cases the Court will not make a decree without other parties, though they might; because they cannot without them make a complete adjustment. They do not state any purpose of proceeding at law; but, quite the contrary, to enable them to proceed in this Court.

LORD CHANCELLOR [LOUGHBOROUGH]. I have felt a good deal of difficulty in forming my idea of this case from the prepossession I have had in my own mind, that the act prohibited by the by-law and guarded against by the charter-party is in its own nature, to use a slight term, extremely improper; for the good faith of the engagement is, that the owners receiving a large freight and demurrage, and the Company leaving to them the selection of the captain and officers, they are to be chosen upon honorable motives.

That clause has been inserted in the charter-party very inartificially, unskilfully, and improperly: but the contract of the ship-owner is this; that he is to receive his freight and demurrage; which is matter of account between him and the Company; he stipulates, that he will not take any farther advantage to himself from the recommendation to the command, but content himself with the freight and demurrage; and it goes on, that he shall either pay or allow to the Company double the sum received, if any. The Plaintiffs have

(1) 2 Atk. 392.

(2) 2 Atk. 387.

not now the charter-party to support an action. The statement in the bill is, that, the account of the freight and demurrage being settled, it was given up; as there was no knowledge of the fact, that *ultra* the freight and demurrage the Defendant had taken these sums stated by the bill; and if all had been disclosed credit ought to have been given to the Company according to the covenant. The demurrer goes both to the discovery and relief; and also takes another ground; that there are not sufficient parties to the bill. As far as it is a demurrer to the discovery, it covers too much; for upon all the authorities, where the case calling the party into this Court is that the contract is not in that state, and not by any fault of his, that he can avail himself of it at law, the discovery, whether the contract existed, or not, cannot furnish of itself cause of demurrer, [* 185] unless the Defendant * can go farther, and state, that no relief can be had upon it any where; and then from the mere circumstance of the demurrer extending too far, to the discovery, to which the Plaintiff is entitled, the Court will not on that account over-rule the demurrer (1) (a). That therefore brings it to the question, whether any relief can be had upon this bill. I cannot say, no relief can be had. What it is to be is another question.

It has been argued, that this is a penalty: on the other hand it is contended to be stipulated damages (b). Suppose, it is to be so considered, as stipulated damages, in that view of it the Plaintiffs would be entitled to a decree, if by an accident, without any fault of theirs, they cannot proceed at law. Suppose, it is to be considered as a penalty, an issue might be directed to ascertain the damages. But there is another view different from either of these; namely, that this is matter of account; that the account of the vessel was settled, when the Company were ignorant of the fact, which entitled them to hold so much of the freight and demurrage, as is equivalent to the sum taken. It is possible, therefore, that the Company might have a decree for the 3500*l*. It is also possible in the view I have of the case, which I do not wish particularly to discuss now, that at the hearing the Court may think, it ought to be inquired into either by an issue or an action at law; if it turns out, that the Court might consider it a species of fraud; and if the thing is improper in itself, or contrary to the agreement; if in its nature it imported an injury to the Company, entitling them to damages upon the whole case. I cannot therefore determine now, that there is no possible decree, that can be made upon this case. The demurrer will not hold upon the relief (2). There is a specific ground also: the demurrer is too extensive upon the discovery. Therefore I am under the necessity of over-ruling it; because I cannot say, to what

(1) See the cases collected, *ante*, vol. iii. 371; and the note, ii. 461, *Remison v. Ashley*.

(a) See, *ante*, 173, note (a).

(b) See Story, Eq. Pl. § 590; *Ib.* § 578 and notes; Wigram, Discovery, Pl. 131, (1st Am. ed.) p. 82, 83, and cases cited in notes.

(2) 1 Swanst. 304.

part of the bill the Defendant is bound to answer. That must come on upon exceptions.

As to the necessity of Wells being a party, the demurrer takes too strong a measure. They may add a party, and amend the bill. If they bring it to a hearing without him, even then, if necessary, they may amend the bill, and make him a party. As to the idea of the informer, if there is such a person to be a party, he should *be a Co-plaintiff. It is impossible to make him a [*186] Co-defendant. It is perfectly clear, the Company cannot give a right of action by their agreement to any person under the denomination of an informer (a).

1. WITH respect to the by-laws of the East India Company, prohibiting sales of commands or offices on board ships freighted by them, under charter parties; see *The East India Company v. Donald*, 9 Ves. 275; *Thomson v. Thomson*, 7 Ves. 442; and, as to the general law on the subject, see the statute 49 Geo. III. c. 126, for the farther prevention of the sale and brokerage of offices.

2. That a demurrer, when good as to the relief asked, is generally good as to discovery also, but that the rule may admit possible exceptions, see, *ante*, note 1 to *Renison v. Ashley*, 2 V. 459.

3. A bill is never dismissed for want of parties, but the plaintiff (generally upon payment of costs) has liberty to amend, by adding the requisite parties; *Jones v. Jones*, 3 Atk. 110; *Palk v. Clinton*, 12 Ves. 66; *Anonym.* 2 Atk. 14; *Holdsworth v. Holdsworth*, 2 Dick. 799; *Andree v. —*, 2 Dick. 768; and where the defendant has not, by his answer, stated the objection of want of parties, but has waited till the cause came on to be heard, he has been refused the costs of the day. *Mitchell v. Bailey*, 3 Mad. 62. Such refusal, however, though within the discretion of the Court, is a deviation from the usual practice, where there are no special circumstances. *Hill v. Kirwan*, Jacob's Rep. 164.

ROSE v. CALLAND.

[1800, JAN. 27, 31.]

UPON a late decision of the Court of Exchequer, that a presumption from non-payment of tithes cannot bar even a lay impropiator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for a specific performance.

THE bill was filed by devisees in trust to obtain the specific performance of an agreement entered into by the Defendant for the purchase of an estate near Lymington, Hants, for 5000*l*.

The sale was by auction at Garraway's Coffee-house on the 29th of August, 1797. The Defendant objected to complete the purchase on account of variations from the particular. By that the premises were described as a freehold estate, and a small part copyhold, consisting of 18 inclosures of rich arable and pasture land surrounding the house, containing together 110 acres (more or less);

(a) See as to parties, *Story, Eq. Pl.* § 166; *Moffat v. Farquharson*, 2 Bro. C. C. (Am. ed. 1844,) 338; *Perrell v. Bryant*, 2 Younge & Coll. 61, 68.

of which about 94 acres are freehold, and free of hay-tithe. The copyhold was described as two fields held under the manor of Pennington Newit for a life aged thirty-one: reserved rent 11s.: heriot 2l. 10s.; or the best beast or chattel.

The objections, stated by the answer were, that 15 acres, called Little Priestlands, described in the particular as copyhold, are in fact leasehold; and the person, upon whose life they depend, described as aged thirty-one, is thirty-four. The material objection was, that it was not ascertained by the abstract, that the premises were exempt from tithe-hay. When that objection was taken, the Plaintiff's solicitor wrote the following answer:

"From the best information I can obtain no tithe of hay has ever been taken within the memory of man; nor any thing paid in lieu of it; and if other tithes have been regularly taken, whilst this has never been taken, I submit, that a legal exemption must be presumed; and that presumption is much strengthened by the tithes of the parish being in lay hands."

The answer stated, that if the Defendant could have been satisfied upon this objection, he would have waived the other, and have accepted a proper compensation.

[* 187] *The *Attorney General*, [Sir John Mitford], for the Plaintiff. In *Strutt v. Baker* (1) your Lordship decided upon the principle, which must govern this case, that the rector having been only in possession of one third of the tithes, the Court would not help him to get possession of the other two thirds. The presumption ought to be raised against a lay-impropriator. The absurdity of holding, that there cannot be a presumption against him, is evident from this instance: an estate was sold in an adjoining parish free from the payment of great tithes: but the conveyance of the tithes could not be found; and the same objection would have been made, if at last the deeds, conveying the tithes, had not been found by accident.

Mr. Mansfield, Mr. Richards, and Mr. Owen, for the Defendant. In *Strutt v. Baker* there was a ground since the case of *Fanshaw v. Rotherham* (2) for saying, the two thirds of the tithes had been severed. Before the case of *Fanshaw v. Rotherham* the law was monstrous; obliging the Defendant against a claim of tithe to produce the original deed, by which that portion of tithes claimed was severed. The longer the time, the more difficult it was to make out the possession. But that was put an end to in that case.

LORD CHANCELLOR [LOUGHBOROUGH]. I can do nothing at present but send this to the Master. There is no state of the case. The question is very important. I should like to have the Master's report and a state of the case; for if I should now hold it a flat objection to the title, that would go upon the presumption, that it is a clear point of law, that a lay-rector, who can convey, contract, and

(1) *Ante*, vol. ii. 625.

(2) In the Court of Exchequer, 3 Gwill. 1177; cited, *ante*, vol. ii. 627, in *Strutt v. Baker*.

diminish his right, which a spiritual rector cannot, is not to be barred from his right to any particular tithe by the length of time, or the circumstances attending the receipt of his other tithes. I should be very loth to go that length. On the other hand I should be very unwilling to make a man purchase a law-suit. The argument is certainly very strong upon the instance mentioned by the Attorney General; where the deeds were found by accident.

For the Defendant. There have been two or three cases lately in the Court of Exchequer upon this subject. In *Nagle v. Edwards* (1) * this distinct point was argued very fully [*188] in the Court of Exchequer; and it was determined, that there can be no presumption from any length of time even against a lay-impropriator.

Lord CHANCELLOR [LOUGHBOROUGH]. If that is so, I am afraid, I cannot make a purchaser take a title in the teeth of that decision.

The *Attorney General*, [Sir John Mitford], in reply said, it was very material to know the nature of the defence in those cases; perhaps it might have been a prescription *de non decimando*. He also referred to Rayner upon Tithes (2) and *Medley v. Calmay* there cited.

Mr. *Graham* (*amicus curiæ*) mentioned the case of *Trinity College v. Barrington*, in the Court of Exchequer in the time of Lord Chief Baron Eyre; where this point was decided in favor of the claims of tithes. The portion of tithes claimed had not been paid for a great length of time. The Chief Baron in giving judgment acknowledged the clear distinction between a lay-impropriator and a spiritual rector from the restraint of alienation upon the latter; but he went upon the idea, that the law clearly was, that no length of time would bar a lay-impropriator.

The reference to the Master was not made: but the cause stood for judgment.

Jan 31st. Lord CHANCELLOR [LOUGHBOROUGH]. If I was to send this case to the Master, I should create a needless expense (3); for upon the case in the Court of Exchequer, *Nagle v. Edwards*, which I have looked into, my difficulty is this: can I make a person take a title in the face of that decision? If I do, I decree him to enter into a law-suit. That case was upon the tithe of agistment. There was a very long possession, and all the inconvenience to induce the Court to raise the presumption. I read that case and also *Lord Petre v. Blencoe* (4) very attentively. It rather struck me, that there was a great deal of evidence. I desire to be understood as not entirely agreeing with the determination of the Court of Exchequer. But I should be in a strange situation in desiring a purchaser to take this title, because I think the point a

(1) 3 Anstr. 702; 4 Gwill. 1442.

(2) Vol. i. 61.

(3) *Post*, *Omerod v. Hardman*, 722; but see *Jenkins v. Hills*, vol. vi. 646.

(4) 3 Anstr. 945.

pretty good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense. Unfortunately they have very distinctly stated it in the particular to be free from hay-tithe. I do not think, the Court of Exchequer weighed sufficiently the effect of *Scott v. Airey* (1) and the other cases (2) (a).

Dismiss the bill without costs; and let the deposit be paid according to the terms of the agreement (3).

1. TITHES belong of common right to the parson of the parish, and equally so, whether he be spiritual rector, or lay impropriator, provided, in the latter case, the title by impropriation is shown, the *onus probandi* lies upon the party claiming exemption; *Meade v. Norbury*, 2 Price, 345; S. C. 3 Bligh, 224, 252, 272; *Nagle v. Edwards*, 3 Anstr. 705; *Boulton v. Richards*, 6 Price, 493; and a prescription in *non decimando* cannot be set up with more success against one than against the other. *Finshaw v. Rotherham*, 1 Eden, 292; *Berney v. Harvey*, 17 Ves. 126; *Heathcote v. Aldridge*, 1 Mad. 243. It follows, that mere non-payment and retainer will not, alone, justify a presumption that a legal grant of the tithes ever existed, unless the actual pernanry and receipt thereof separate from, and independent of, any interest in the land from which they accrue, be shown. *Scott v. Airey*, 3 Gwill. 1174; *Meade v. Norbury*, 2 Price, 366; and see note 2 to *O'Connor v. Cook*, 6 Ves. 665.

2. As to the different modes by which religious communities were exempted from payment of tithes, and in what cases the grantees of lands which came to the Crown, at the time of the dissolution of monastic establishments, are entitled to the same exemptions, see the notes to *Strutt v. Baker*, 2 V. 625.

(1) 3 Gwill. 1174; cited in *Strutt v. Baker*, and *Nagle v. Edwards*; see *Berney v. Harvey*, *post*, vol. xvii. 119; *Meade v. Norbury*, 2 Pri. 338.

(2) *Foxcroft v. Parris*, *post*, 221.

(a) A Court of Equity will not decree the specific performance of an agreement of sale, and oblige the purchaser to accept a title, which the vendor cannot make out to be clearly good and free from incumbrance. *Buller v. O'Hear*, 1 Dessaus. 382; *Levis v. Herndon*, 3 Litt. 358; *Kelley v. Bradford*, 3 Bibb, 317; *Seymour v. Delancey*, 1 Hopk. 436; *Young v. Lillard*, 1 Marsh. 482; *Morgan v. Morgan*, 2 Wheat. 290, 299; 1 Fonb. Eq. b. 1, ch. 3, § 9, note (i); see also 2 Sugd. Vend. & Purch. (6th Am. ed.) ch. 10, § 3, p. 165, *et seq.*; *Reed v. Noe*, 9 Yerger, 283; *Watts v. Waddle*, 6 Peters, 389; *Hepburn v. Auld*, 5 Cranch, 262.

It is sufficient, however, if the vendor be able to make a good title before decree pronounced, although he had not a good title when the contract was made. *Hepburn v. Auld*, 5 Cranch, 262, 275; *Finley v. Lynch*, 3 Bibb, 566; *Tyree v. Williams*, 3 Bibb, 366; *Seymour v. Delancey*, 3 Cowen, 445; *Pierce v. Nichols*, 1 Paige, 244; *Cotton v. Ward*, 3 Monro, 304, 313; *Baldwin v. Salter*, 8 Paige, 473; *Dutch Church &c. v. Mott*, 7 Paige, 78. If there be any doubt or difficulty about the title it is usually referred to a Master to be examined and reported on. *Pierce v. Nichols*, 1 Paige, 246; *Macomb v. Wright*, 4 Johns. Ch. 659, 670.

But equity will not relieve a purchaser, who had a full knowledge of the defect in the title. *Craddock v. Shirley*, 3 Marsh. 288; or if his conduct has amounted to a waiver of the objection. *Roach v. Rutherford*, 4 Dessaus. 126; see *Ramsay v. Brailsford*, 2 Dessaus. 590, 591. See also farther on the subject of enforcing specific performance in cases of defective and doubtful titles. *Tomlin v. M'Chord*, 5 J. J. Marsh. 136; *Beale v. Seiveley*, 8 Leigh, 658; *Bryan v. Reed*, 1 Dev. & Bat. Eq. 86; *Watts v. Waddle*, 1 McLean, 200; *Cooper v. Denne*, 4 Bro. C. C. (Am. ed. 1844), 87, 88, and notes; *Poole v. Shergold*, 2 ib. 118, 119.

(3) *Heathcote v. Aldridge*, 1 Madd. 236. As to the title, which a purchaser has a right to expect, see *Cooper v. Denne*, 4 Bro. C. C. 80; *ante*, vol. i. 565, and the note, 567; and as to sales by auction particularly, *Calverley v. Williams*, *Calcraft v. Roebuck*, i. 210, 221, and *Conolly v. Parsons*, iii. 625, n. As to a purchase under a Commission of Bankruptcy, see *ante*, 147, the note to *Pope v. Simpson*.

3. Whenever a rational doubt exists with respect to a title, a Court of Equity (though it inclines to think the title good) will not compel a purchaser to accept it; see note 2 to *Cooper v. Denne*, 1 V. 565; the question, whether an estate, which was sold as tithe free, is really exonerated from payment of tithe, is not such a question as will be referred to the Master, on motion, without the consent of the party who resists specific performance of the purchase contract, see note 5 to the same case; and, as to the general practice in other cases, where the single point in dispute is, whether a vendor can make a good title, of referring the question to the Master, unless the Court clearly sees the objections are such as cannot be removed; see note 6 to the before-mentioned case.

SMITH v. SMITH.

[1800, JAN. 31.]

A PROVISION previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the real and personal estate of the husband, if precarious and uncertain, as, that the personal estate shall go according to the custom of London, does not bar her. (a)

Dower established against assignees under a joint commission of bankruptcy upon estates purchased with the partnership fund, but conveyed to one partner under a specific agreement, that the estates should be his, and he should be debtor for the money, [p. 188.]

IN April 1791 Robert Smith married Elizabeth Galhie, an infant. By a settlement, previous to the marriage, it was provided, that in case the marriage should take effect, and the said Elizabeth should survive her husband, and there should be no issue at his decease or she should not be *enceinte*, then she should be entitled to receive to her own use, not only all such share of his personal estate as she would be entitled to by the custom of London, as if she had been a freeman's widow of the said city before the act 11 Geo. I. and as if the same had never been made, but that she should also be entitled to have, receive, and enjoy, for her own use all the household goods and furniture of the said Robert Smith; and in case there should be any child or children of the marriage living at his decease, or she should be then *enceinte*, then that she should be entitled to have, &c. all such household goods and furniture, as aforesaid; and that the residue of the personal estate and effects of Robert Smith should be subject to, and distributed and distributable among, said Elizabeth Smith and such child or children of said intended marriage as should be living at the decease of Robert Smith, or that she might be then *enceinte* with, according to the custom of London, as if she and such child or children had been the widow and child or children of a freeman, &c.

(a) See upon this subject *Caruthers v. Caruthers*, 4 Bro. C. C. (Am. ed. 1844,) 500, 513, and notes; *Durnford v. Lane*, 1 ib. 106, 107; 4 Kent, (5th ed.) 55, 56; 2 ib. 243, 244; *M'Cartee v. Teller*, 2 Paige, 511; 2 Macpherson on Infants, (Lond. ed. 1842,) ch. 36, § 4, p. 530, 534-536; *Williams v. Chitty*, and *Chitty v. Chitty*, ante, 3 V. 545, note (a).

It was also covenanted, that if Robert Smith should after said marriage invest all or any part of his personal estate in the purchase of any messuages, lands, and hereditaments, either freeholds or copyholds of inheritance, and Elizabeth Smith should happen to survive her husband, in such case she, her heirs and assigns, should have in fee as full and beneficial share of such messuages, lands, &c. so to be purchased, as she, her executors, &c. would have been entitled to by virtue of said presents of and in the personal estate, wherewith the same should have been so purchased, if such purchase had never been made.

The indenture contained a proviso, that the provision thereby intended to be made for the said Elizabeth, in case the said marriage should take effect, should be deemed and taken to be in full satisfaction for all manner of dower or thirds, free bench and customary estates, claims and demands, whatsoever, which she might become entitled unto out of the freeholds, copyholds, or personal estate whatsoever, wherein or whereof Robert Smith was or at any time hereafter might be seised or possessed, or to which she might be entitled, and in full bar and preclusion of the same.

In June 1789 Robert Smith, who was a brewer at Croydon, took his brother Charles Smith into partnership with him; and in the course of that partnership at several times down to the 6th of October, 1791, Robert Smith purchased freehold and copyhold estates at Croydon, Merton, and Wotton, in Surrey; and was seised of the legal estate of the said freehold premises in fee, except one, purchased upon the 29th of January, 1791, which was conveyed to him and a trustee, to bar dower, and of the copyhold premises according to the custom of the manor. He was also seised of other freehold estates by inheritance, or by purchases previous to the partnership.

The estates purchased consisted of a brew-house and premises and some public houses, for the purposes of the trade. When the partnership was formed, it was agreed, that Robert Smith's debts were to be considered as his separate debts; but the interest was to be paid out of the partnership property. It was also agreed, that the freehold and copyhold estates, of which he was then seised should continue his separate property: but the rents of those

[* 191] * estates, which consisted of public-houses, and also of the estates purchased in his name and to be considered as his separate property, were carried to the partnership account; and the partnership allowed him interest, at first at the rate of 5 per cent., and afterwards at 4 per cent., upon the estimated value of the estates, of which Robert Smith was seised before the partnership, and upon the purchase-money of those, which were purchased. As these purchases were made, Robert Smith drew the money from the partnership; and his account was debited with the amount and interest. During the partnership many of the private debts of Robert Smith were paid off, and many new debts contracted upon his separate notes: the debts paid and the interest of those new debts were paid

with the partnership money ; for neither of which was Robert Smith charged in the partnership accounts ; but in their annual settlements all the debts, as well those contracted by the trade as those secured by Robert's private notes, were entered under the head of debts at the brew-house.

In 1797 a joint Commission of bankruptcy issued against him and his brother ; under which the freehold and copyhold estates and also certain leasehold estates were sold by the assignees for 8500*l*. Upon that occasion an agreement, dated the 23d of July, 1798, took place between Elizabeth Smith and the assignees ; reciting the bankruptcy, sale, &c. ; and that Elizabeth Smith claimed to be entitled to dower out of said messuages, &c. or some of them ; and that it had been required by the purchasers, that she should execute a release, and levy a fine ; and that to induce her so to do the assignees had proposed, that out of the money arising from the sale she, her executors, &c. should receive the sum of 330*l*. in full satisfaction and discharge of her dower of and in the same premises, in case the whole shall be found subject to her dower ; and so in proportion for such parts thereof as shall be found subject to such dower, as aforesaid, to which she had agreed, it was witnessed, &c. and she joined in the fine, accordingly.

The bill was filed by Robert Smith and his wife, against the assignees under the Commission ; praying, that they may be decreed specifically to perform the agreement, and to pay the sum of 330*l*., or such part thereof as the Court shall think the Plaintiff Elizabeth entitled to.

* The Defendants by their answer submitted, that the [* 192] Plaintiff Elizabeth will not upon the event of her surviving her husband be entitled to dower ; inasmuch as she is barred to claim dower by the marriage settlement ; and also, because part of the estates, as to which Robert Smith was seised of the legal estate in fee, was not purchased with his own money, but with the partnership money, and for the use of the partnership ; for whom he was a bare trustee.

The *Attorney General*, [Sir John Mitford], and Mr. Cooke, for the Plaintiff. Upon the first point, whether the Plaintiff is barred from dower by the settlement, executed, when she was an infant, the question is, whether this is within the cases. In *Carruthers v. Carruthers* (1), in which all the cases, particularly *Drury v. Drury* (2), were much considered, the wife was held not barred. A provision to be in bar of dower must be something certain, and not of the nature of this provision ; which is simply, that if her husband at his death leaves a considerable property, she shall have a proportion of

(1) 4 Bro. C. C. 500.

(2) 5 Bro. P. C. 570 ; 4 Bro. C. C. 505, n ; 2 Eden, 39 ; Wilm. 177 ; Mr. Hargrave's note ; Co. Lit. 36, b. note 7. Upon that authority dower was barred by a settlement of personal estate previous to the marriage of a female infant, in *Chitty v. Chitty*, ante, vol. iii. 545. See the note, 549 ; post, *Clough v. Clough*, 710, and the note, 717 ; *Milner v. Lord Harewood*, xviii. 259.

it, as if it had been personal estate by the custom of London. That is perfectly precarious; depending entirely upon his circumstances. Such a precarious interest cannot prevent his wife, an infant at the time of the settlement, from claiming her dower; and in this instance the husband is become a bankrupt. It is clear, the title to dower is in all cases a security for the performance of a contract of this kind. That was determined in Ireland in the case of Lord Dillon. His mother had by contract a right to an annuity, to be settled upon her in lieu of dower. The present Lord Dillon, her son, filed a bill to restrain her from proceeding. The Court thought, she had a right to proceed, and refused to stay proceedings, unless he would immediately go before the Master, and charge the estate with the annuity. That was the case of an adult. It would have been very good to bind her, even if she had been an infant, within *Drury v. Drury*. In *Carruthers v. Carruthers* the Master of the Rolls put the case of a charge in bar of dower made upon an estate with a bad title; and held, that it would be no bar. It is not to be [*193] contended now, that according * to Lord Coke's definition a jointure must be a settlement out of freehold estate: but it was determined in *Carruthers v. Carruthers*, that, according to the other part of the definition, it must be competent.

Upon the second point, by the agreement between the parties the estates purchased were conveyed to Robert Smith; and though the purchase-money was paid out of the partnership funds, he was to be made debtor for those sums. From the nature of the transaction therefore the estates were his; and he was debtor to the partnership for the sums paid for them: but that will not affect her legal title to dower.

Mr. *Richards* and Mr. *W. Agar*, for the Defendants. In *Carruthers v. Carruthers* no provision was intended for the wife in a foreseen case: she was to have nothing, unless she should survive her mother-in-law; which event did not happen.

Upon the other point, it is admitted, that the partnership funds were employed in purchasing these estates; and then they are as much part of the partnership stock as any other. A decision, that the wife is dowable out of these estates will be a precedent for fraud by enabling a partner upon an apprehension of bankruptcy to provide for his wife at the expense of his creditors.

LORD CHANCELLOR [LOUGHBOROUGH]. If these estates had only been conveyed to one partner, having been purchased with the partnership funds, they would have been part of the partnership property (a). But that was not the nature of the transaction. The distinc-

(1) Co. Lit. 37, a; see Mr. Hargrave's note, 227; Co. Lit. 36, b; *ante*, vol. ii. 129; *French v. Davies*, *Strahan v. Sutton*, *Couch v. Stratton*, *ante*, ii. 572; iii. 249; iv. 391, and the notes, i. 259, 337.

(a) See *Thornton v. Dixon*, 3 Bro. C. C. (Am. ed. 1844,) 200, note (a); Story, Partnership, ch. 6, § 93. The general principle now declared in the English law is, that real estate acquired for the purposes of a trading concern is to be considered as partnership property, and to be applied in satisfaction of the demands of the partnership. *Fereday v. Wightwick*, 1 Russ. & My. 45. It is taken to be personal estate, and retains that character as between the real and personal

tion is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock; but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money. The whole turns upon that. I take it as a fact agreed, that upon that agreement, if the partnership had been dissolved, the estates would have remained with Robert Smith, and, whether they were worth so much, or not, he would have been debtor for the money. If he had sold one of these houses, his sale would have been good, even with notice of their manner of dealing and their transactions, if the fact is true as to the agreement; and no person would have *taken the title without the wife [*194] joining. The single question is, whether I could have compelled her to levy the fine. I think, she is entitled to dower out of the estates. She must be paid; or they must have sold the estates subject to her dower. It seems to me, she is entitled to the whole (1).

1. THAT property, though freehold in its nature, yet, if purchased with joint funds for the sole purposes of a partnership trade, may be considered as if it were mere personality, see, *post*, note 1 to *Ripley v. Waterworth*, 7 V. 425.

2. As to the paramount title of dower in general cases, see the notes to *Wake v. Wake*, 1 V. 335.

representatives of a deceased partner. *Phillips v. Phillips*, 1 Mylne & Keen, 649; *Broom v. Broom*, 3 Mylne & Keen, 443; *Morris v. Kearsley*, 2 Younge & Coll. 139; 3 Kent, (5th ed.) 37, 38, 39, and notes; 1 Story, Eq. Jur. § 674; *Horie v. Carr*, 1 Sumner, 181-186. See also for the American Law on this subject, 3 Kent, (5th ed.) 37, 38, 39, and notes. Mr. Chancellor Kent seems very much to favor the general principle said above to be declared in the English law. 3 Kent, *ubi supra*.

This subject underwent a very full and thorough discussion in *Dyer v. Clark*, 5 Metcalf, 562, and it was there held, that when real estate is purchased by partners, with the partnership funds, for partnership use and convenience, in the absence of any express agreement, or of circumstances showing an intent, that such estate shall be held for their separate use, it will be treated in Equity, as vesting in them, in their partnership capacity, and it will be applied, if necessary, to the payment of the partnership debts. See also to the same effect, *Howard v. Priest*, 5 Metcalf, 582, where it was also held that the widows of the partners are not entitled to dower in such estate, nor are the heirs of the partners entitled to the rents and profits of such estate, which accrue after the death of their ancestor, if the estate and such rents thereof are required for payment of the partnership debts. See also *Dyer v. Clark*, 5 Metcalf, 562. In this last case it was said by Shaw, Ch. J. that the decision in *Dyer v. Clark* does not stand opposed to the case of *Goodwin v. Richardson*, 11 Mass. 469. See farther upon this subject and to the same effect, *Burnside v. Merrick*, 4 Metcalf, 537; *Sigourney v. Munn*, 7 Conn. 11; *Houghton v. Houghton*, 11 Sim. 491; *Savage v. Carter*, 9 Dana, 410; *Greene v. Greene*, 1 Ham. 542; *Marvin v. Trumbull*, Wright, 386; *Richardson v. Packwood*, 13 Martin, 290; *Forde v. Herron*, 4 Munf. 316; *Richardson v. Wyatt*, 2 Desaus. 471; *Phillips v. Crammond*, 2 Wash. C. C. 441; *Wooldridge v. Wilkins*, 3 V. E. Howard, 360; *Hunt v. Benson*, 2 Humph. 459.

But see *Yeatman v. Woods*, 6 Yerger, 20; *M'Alister v. Montgomery*, 3 Hayw. 94, in which a contrary doctrine seems to have been held.

Blake v. Nutter, 19 Maine, 16; *Goodwin v. Richardson*, 11 Mass. 476; and *Coles v. Coles*, 15 Johns. 159, were actions at law. See also *Cookson v. Cookson*, 8 Sim. 529; *Smith v. Jackson*, 2 Edw. Ch. 28.

(1) 1 Fonb. Tr. Eq. 74; *post*, *Bell v. Phym*, vol. vii. 453; *Balmain v. Shore*, ix. 500; xi. 665; *Crawshaw v. Maule*, 1 Swanst. 495; see 521, 2.

GREENWELL v. GREENWELL.

[1800, JAN. 27; FEB. 3.]

DEVISE to an infant grandson at twenty-one with accumulation in the mean time; with similar limitations in case of his death under twenty-one to his sisters.

Their father being dead, having left all his property, which was inconsiderable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry, whether it was for the benefit of the infants; the Court judging of that. (See note 50, *post*, 199, a,) [p. 194.]

Residuary bequest to a very large amount in favor of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital; and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the Court directed maintenance, taking the consent of the mother, [note, p. 195.]

Residuary bequest in favor of infant grandchildren, payable at twenty-one or marriage, or to the issue of those dead, with survivorship, and accumulation till the time of payment, and a limitation over absolutely, in case of the death of all without issue before that time. The father in consequence of bankruptcy being wholly unable to maintain his children, maintenance was directed by the Court, taking the consent of the persons, to whom the property was given over, [note, p. 197.]

Irregular to confirm Reports as to maintenance on motion, (a) [p. 199.]

NICHOLAS GREENWELL by his will, dated the 26th of June 1793, gave and devised to Cuthbert Greenwell and John Greenwell all his real estates whatsoever and wheresoever, to hold to them, their heirs and assigns, in trust for the testator's grandson John Greenwell, until he should attain the age of twenty-one years; and from and immediately after his attaining that age the testator gave and devised all his said real estates to him, his heirs and assigns, for ever; with power to his trustees to let all or any part during the minority of his said grandson, as they should think fit, and to take and receive the rents, issues, and profits, thereof from time to time, as the same should accrue and become due, for the use and benefit of his said grandson; and he directed, that his trustees should from time to time place out at interest upon Government, real, or any other, security they should approve of, the said rents and profits; and which with the interest thereof should accumulate, until his said grandson should attain his age of twenty-one years; when the same should be paid to him, his executors, &c.: but in case he should happen to die, before he should attain the age aforesaid, then and in such case the said rents and profits and the interest with the accumulations thereof should be in trust for the testator's three grand-daughters, Mary Greenwell, Hannah Greenwell, and Elizabeth Greenwell, the sisters of John Greenwell, equally, share and share alike; to be paid to them respectively upon their attaining the age of twenty-one years or day of marriage, which should first happen; and he declared his farther will to be, that if his said grandson should not attain his said age of

(a) See 1 Macpherson on Infants, (Lond. ed. 1841,) 107.

twenty-one years, then and in such case his said real estates should be in trust for his said three grand-daughters, their heirs and assigns, equally, share and share alike, taking the same as tenants in common, and not as joint-tenants; and they were to be entitled to their respective shares *therereof upon [*195] their respectively attaining the age of twenty-one years or marriage, which should first happen.

The testator died in August 1794. John Greenwell, his son, and father of the children mentioned in the will, died in the life of the testator, leaving a very inconsiderable property, real or personal. By his will he gave all his property to his wife; who married again; and upon the death of her second husband married a third; who was not in circumstances to maintain and provide for the testator's grandson.

The bill was filed on behalf of the testator's grandson, an infant, by his next friend; praying, that a guardian and receiver may be appointed; and that a suitable allowance may be made to the Plaintiff for his maintenance and education out of the rents and profits of the trust estates; and that the residue of the said rents may be secured and laid out, &c.; and that an account may be directed against the trustees.

The *Attorney General* [Sir John Mitford] and Mr. Leach, for the Plaintiff, and Mr. Mansfield, Mr. Scafe and Mr. Hubbersty, for the other Children, pressed for a maintenance.

LORD CHANCELLOR [LOUGHBOROUGH]. I fear, if I should make the decree, it would be my will, and not the testator's.

There is a case, which I wish to be inquired into, in Sir Henry Cavendish's family (1). It is not reported. Mr. Brad-

(1) The following note, with which the Reporter has been favored, was sent to the Lord Chancellor:

Cavendish v. Mercer. IN CHANCERY, March the 9th, 1776.

Richard Bradshaw, Esq. by his will, dated the 28th of March, 1773, gave to the separate use of his only child Sarah, wife of the Defendant Henry Cavendish, an annuity of 400*l.* to be secured by an appropriation of a sufficient part of his personal estate. He then gave 10,000*l.* to his executors, upon trust to be placed out at interest, and paid to such one or more child or children of the Defendant Sarah Cavendish at twenty-one years of age, as she should appoint; and in the mean time he directed his executors to receive all the interest of the said 10,000*l.* and place out the same from time to time to accumulate, and to stand possessed of such accumulation in trust for such children as should be entitled to the 10,000*l.*, and in the same shares; and in case his daughter should make no appointment, the said 10,000*l.* and the accumulation to sink into the residue of his personalty. He gave to his son-in-law Henry Cavendish 1000*l.*; to his grandson the Plaintiff Richard Cavendish, 8000*l.*; and to his grandson the Plaintiff George Cavendish, 8000*l.*: such legacies to his grand-sons to be paid at twenty-one, but without any interest in the mean time: and in case of death under that age to sink into the residue. He gave to his three grand-daughters, the Plaintiffs Catherine, Deborah, and Sarah Cavendish, 10,000*l.* each, and to his grand-daughter Theresa Maria Cavendish, 3000*l.* to be paid at twenty-one, or marriage with consent of their mother or guardians, and not otherwise; but without any interest in the mean time; and in case of death, or marriage without consent, to sink into the residue; and after giving several pecuniary legacies he bequeathed the residue of his personal estate upon trust to place it out at interest to accumulate, and to make over all the funds

shaw, the father of Lady Cavendish, left a very large fortune ; but chose to have an accumulation during the minority of Sir Henry Cavendish's children ; leaving no provision for maintenance. The fortune was to vest, I think, in his first child, that should attain the age of twenty-one. Sir Henry Cavendish [* 197] stated, and with truth, that he * was not of ability to maintain his children according to the expectation of the fortune that some of them might have. The Court held it quite contingent, which child would be entitled : and that it was for the benefit of them all, that they all should have an education.

It was a decree of Lord Bathurst's, I think. I wish it to be looked into. If there was one precedent, I should feel a little bolder to do what I have great inclination to do, if I can.

The will was declared well proved ; and the cause stood over for the purpose of having that case inquired into.

Feb. 3d. The cause came on again.

LORD CHANCELLOR [LOUGHBOROUGH]. A circumstance strikes one in this case of *Cavendish v. Mercer* : Sir Henry Caven-

and accumulations unto his grand-son, the Plaintiff Augustus Cavendish, upon attaining twenty-one ; but in case he should die under that age, then upon trust for his grand-sons, the Plaintiffs Richard and George Cavendish, equally, share and share alike, at their respective ages of twenty-one ; but if either should die under that age, in trust for the survivor : in case of the death of all three grand-sons, in trust for his grand-daughters at twenty-one, or marriage with consent, as aforesaid. In case all his said grand-children should happen to die before the times appointed for their enjoying such funds and securities, to be purchased with such residue, as aforesaid, together with such accumulated funds and interest, then he gave the same unto his said daughter, the Defendant Sarah Cavendish, her executors, &c. for ever ; and in the mean time and until his said grand-children or some one of them should become entitled to the said funds by virtue of his will, upon trust to receive all the dividends and interest, which should arise from the funds to be purchased with the residue aforesaid, and invest the same from time to time at interest to accumulate, and stand possessed of the accumulation in trust for the person or persons, who should be entitled to the funds to be purchased with the residue.

The Defendant Henry Cavendish, and Sarah his wife, by their answer stated, that the said Henry Cavendish took out administration with the will annexed ; that they were desirous, that the whole or part of the interest of the said legacies should be applied in the maintenance of the Plaintiffs ; inasmuch as the Defendants had a large family of children, consisting of the Plaintiffs and one other child, born since ; for whom no provision was made by the said will ; and the net annual income of the Defendant's estate was 1100*l.* a-year, exclusive of an annuity of 700*l.* a-year ; which his father paid him, so long as his father enjoyed a place under the Crown ; and therefore the said Defendant could not maintain the Plaintiffs in proportion to their fortunes.

The Lord Chancellor made the usual decree for taking the accounts ; and ordered, that the Master should, in case the Defendant Mrs. Cavendish should appear before him separate from her husband, and consent thereto, inquire into the circumstances of the Defendant Henry Cavendish ; and whether it was proper to make any and what allowance for the maintenance and education of the Plaintiffs, the infants, and state the same with his opinion thereon to the Court.

The Master by his report, dated the 18th of November, 1776, stated, that it would be proper to allow certain sums therein for the maintenance ; and that report was afterwards confirmed.

dish was not under a disability to maintain his children. He could not give them that large allowance, according to the fortune, to which they might be entitled; and there was a great number: but he had 1800*l.* a-year; and therefore it cannot be said, he could not maintain his children.

For the Plaintiff. There is another case, *Fendall v. Nash* (1).

(1) *Fendall v. Nash.* In CHANCERY, December the 24th, 1779.

The order made in this cause recited, that William Fendall, Mary Fendall, John Fendall the younger, and Harriet Fendall, the only children of the Defendants John Fendall and Sarah, his wife, upon the 18th of December preferred their petition; stating, that Mary Bolde, late grand-mother of the Plaintiffs, by her will, dated the 25th of February, 1759, after several pecuniary and specific legacies gave all the rest of her personal estate to Joseph Nash and John Barnes, in trust to place it out at interest upon real or Government security, and to improve the same from time to time; and that after the decease of the survivor of John Fendall and Sarah his wife, and not before, the trustees should pay such residue of her personal estate together with the interest and improvement, which should be made thereof, to and among all and every the child and children of her daughter Sarah Fendall as should be living at the decease of her and her husband John Fendall, equally to be between them share and share alike, if more than one: if but one, the whole to such one; to be paid to the sons at their respective ages of twenty-one years, and to the daughters at their respective ages of twenty-one years or days of marriage; which should first happen; and in case any such child or children of her said daughter should die, before his, her, or their, share of his said personal estate should become payable, as aforesaid, without issue, *then that the share of such child so dying should go and survive to [* 198] such surviving children, to be divided among them, as aforesaid, and to be paid as their original shares; and in case at the decease of her said daughter and her said husband any child of her daughter should be dead, or should afterwards die, before his or her share should become payable, as aforesaid, leaving issue, then the share of such child should go to such his or her issue: but in case the testatrix's said daughter should leave no child living at her death, nor any issue of any such child or children, or in case all and every such child or children should die without issue, before their shares should become payable, then to pay one half part of the residue to the Defendant William Nash, his executors, &c., and the other half part to the Defendant Joseph ———, his executors, &c., and she appointed her trustees executors.

By the decree, made upon the 29th of May, 1761, the accounts were directed.

By the Master's report, dated the 12th of March, 1764, it appeared that the residue consisted of 25,780*l.* Bank Annuities 3*l.* 10*s.* per cent. of 1758; and that John Fendall had become partner with ——— Lodge; and a commission of bankruptcy issued against them in February, 1778, by which the Defendant Fendall and his family were reduced to almost absolute indigence.

By an order, made on the 5th of July, 1779, it was referred to the Master to see, if it was for the benefit of the petitioners to make any and what allowance to each of them respectively for their maintenance and education and from what time.

The Master by his report, dated the 17th of December, 1779, stated the bankruptcy of John Fendall; and that the Plaintiff William Fendall, his eldest son, was of the age of twenty-one; Mary Fendall, twenty; John Fendall the younger, seven; and Harriet Fendall, four; that John Fendall, the father, has, by the means aforesaid become utterly incapable to maintain and educate his said children; and that none of them had fortunes except under the said will; that William was a student of the Temple; and intended to be placed under a special pleader; the second son was a writer in the India Company's service; and that the two daughters lived with their father; and that it was proposed on the part of the children, that an allowance of 200*l.* a-year should be made for the maintenance and education of William and John respectively for the time past, from the 1st of February, 1778, and for the time to come; and that 100*l.* a-year each should be allowed for

In that instance the father was wholly without the means of maintaining the children. Lord Thurlow made the reference; and confirmed the report approving of maintenance, and a considerable maintenance too.

[* 199] *Lord CHANCELLOR [LOUGHBOROUGH]. The order of Lord Thurlow in that case is exactly to the same effect and under the same circumstances as in *Cavendish v. Mercer*; taking the consent of the persons, who would be ultimately entitled in the event of the death of all the children.

I think myself sufficiently warranted to make the decree you pray; and there is no occasion for a reference. I judge, that it is for the benefit of the children (a).

I must direct the Master to settle what is proper to be allowed for the maintenance for the time past since the death of the testator (1) (b), and for the time to come, and to appoint a guardian.

the maintenance and education of Mary and Harriet; and William Nash and Joseph —, who had since the decree attained twenty-one, had consented to such allowances; and the Plaintiff William Fendall, who was of age, had in like manner signified his consent to his brother and sisters having such allowances; and as John Fendall, the father, appeared to be totally unable to provide a proper support, maintenance and education, for his said children, and they had no present fortune or means of livelihood or subsistence or of education, the Master stated, that he conceived, it would be for the benefit of the petitioners respectively, that an allowance should be made for their respective support, maintenance, and education, out of the interest from the 17th of March, 1778, the time of their father's failure: that is, 200*l.* a-year for the support and maintenance of the petitioner William Fendall; the like sum for the petitioner John Fendall; so as such respective sums do not exceed at any time the interest or dividends of one fourth part of the said capital sum of 25,780*l.* Bank Annuities; the sum of 100*l.* a-year for the support and maintenance of the petitioner Mary; and 50*l.* a-year for the maintenance and education of Harriet.

The prayer of the petition was, that the report may be confirmed.

The order was, that the report be confirmed; William Nash and Joseph — consenting.

(a) See, on this subject of maintenance, 2 Story, Eq. Jur. § 1354, 1355; *Burnet v. Burnet*, 1 Bro. C. C. (Am. ed. 1844) 179, note (1); *Hughes v. Hughes*, ib. 387, and notes; *Andrews v. Partington*, 3 ib. 60; *Munday v. How*, 4 ib. 223; *Ex parte Bond*, 2 My. & Keen, 439; 1 Macpherson on Infants, (Lond. ed. 1841) ch. 22, § 2 & 3, p. 219 *et seq.*; *Matter of Davison*, 6 Paige, 136; *Allen v. Coster*, 1 Beavan, 202; *Clay v. Pennington*, 8 Sim. 359; *Josselyn v. Josselyn*, 9 Sim. 63. The decisions in *Greenwell v. Greenwell*, and *Fendall v. Nash*, in the note, *ante*, 197, were overruled by Lord Eldon in *Errat v. Barlow*, 14 Ves. 202, as giving maintenance out of a fund not properly applicable for that purpose; but they remain authorities in other respects.

It was held, in *Myers v. Myers*, 2 M'Cord, Ch. 255, that, if the father is in indigent circumstances and the children are wealthy, the Court will allow for maintenance: otherwise the parent must support his children. See, also, to the same effect, *Chapline v. Moore*, 7 Monro, 173. See, farther, *Dupont v. Johnson*, 1 Bai. Eq. 279; *Cudworth v. Thompson*, 3 Desaus. 258; *Ambler v. Macon*, 4 Call. 606.

As to the necessity for a reference, see *Matter of Bostwick*, 4 Johns. Ch. 104, 105.

(1) *Post*, vol. ix. *Sisson v. Shaw*, 285, and the note, 288; *Collis v. Blackburn*, 470; *Maberly v. Turton*, xiv. 499.

(b) Although it was formerly otherwise, yet it is now usual to allow maintenance for the time past. See *Hill v. Chapman*, 2 Bro. C. C. (Am. ed. 1844,) 231, and notes; *Andrews v. Partington*, 3 ib. 60, notes; *Matter of Bostwick*, 4 Johns. Ch. 104; *Wilkes v. Rogers*, 6 John. 566.

The Lord CHANCELLOR observed, that the note of *Cavendish v. Mercer* must be erroneous in representing, that the Report was confirmed by Lord Thurlow; the Order for confirming the Report *nisi* being made on the 28th of November, 1776, it was impossible to suppose, they would have rested upon it so long.

His Lordship also noticed, that the Report was confirmed upon motion; that the practice of confirming these Reports on motion was irregular; and this was not the only instance of that practice in the time of Lord Bathurst (1). —

1. With respect to the allowance of interest, by way of maintenance, to infant legatees, see, *ante*, note 2 to *Crickett v. Dolby*, 3 V. 10.

2. That it is not necessary to show the positive inability of their parent to maintain them, in order to justify an allowance for the maintenance of infant legatees, see note 2 to *Hoste v. Pratt*, 3 V. 730; and the old rule, according to which no retrospective allowance for time past was ever made, is now altered. *Sisson v. Shaw*, 9 Ves. 288; *Collis v. Blackburn*, 9 Ves. 471; *Maberly v. Turton*, 14 Ves. 500; *Ex parte Darlington*, 1 Ball & Bea. 240.

3. As it was decided by the principal case, that a master's report, with respect to allowance of maintenance, ought not to be confirmed on motion, so, it has been also settled, that exceptions do not lie to such a report: *Ex parte Nichols*, 1 Brown, 577: the proper mode of applying to have such reports either confirmed or varied, is by petition, stating the report so that the Court may judge of it. *Price v. Shaw*, 2 Dick. 732; *Ex parte Burton*, 1 Dick. 395.

RAYMOND v. BRODBELT.

[1800, FEB. 3.]

LEGACY general, notwithstanding an appropriation of part of the property. (a)
Legacy of a sum of money Jamaica currency decreed with Jamaica interest from the death of the testator, (b) [p. 199.]

FRANCIS RIGBY BRODBELT, late of Jamaica, by his will, dated the 2d of September 1794, after several pecuniary and specific legacies,

(1) For the rule of the Court as to giving interest by way of maintenance, see *Crickett v. Dolby*, *Mitchell v. Bower*, and *Tyrell v. Tyrell*, *ante*, vol. iii. 10, 283; iv. 1; *Chambers v. Goldwin*, *post*, xi. 1. The extension of that rule by *Greenwell v. Greenwell*, and the cases there cited has been much disapproved, and not followed in any case admitting a distinction. See the notes, *ante*, vol. iii. 12; *post*, xiv. 203.

(a) See, as to the subject of general and specific legacies, *Coleman v. Coleman*, *ante*, ii. 639, note (a) and cases cited; *Nisbett v. Murray*, *ante*, 157, note (a).

Legacies of quantity in the nature of specific legacies, as, of so much money with reference to a particular fund for payment, are called by the civilians *demonstrative* legacies; they are so far general and differ so much in effect from those properly specific, that if the fund be called in or fail, the legatees will not be deprived of their legacies, but will be permitted to receive them out of the general assets: and yet these legacies are so far specific, that they will not be liable to abate with general legacies upon a deficiency of assets. 2 Williams, Executors, (2d Am. ed.) 839, 844. See, also, *Fowler v. Willoughby*, 2 Sim. & Stu. 358; *Willor v. Rhodes*, 2 Russ. 445; *Livesay v. Redfern*, 2 Younge & Coll. 90.

(b) This case in reference to interest was decided on its particular circumstances. Sir William Grant, in *Bourke v. Ricketts*, 10 Ves. Jr. 334; 2 Williams, Executors, (2d Amer. ed.) 1027, 1028. See, also, *Malcolm v. Martin*, 3 Bro. C. C. (Amer. ed. 1844,) 53, and notes.

reciting, that he had remitted several sums of money to England, which he had directed to be invested in Government funds, and which he believed had been so invested either in 3 per cent. Bank Annuities or in 3 per cent. Consolidated Bank Annuities; and reciting, that it being his intent and meaning, that the provisions for his younger children should be by equal portions of such Bank Annuities, in which the said moneys had then been invested; therefore in case the sums he had then already invested therein, or

[*200] *might do before his death, should not be sufficient for the purposes therein-mentioned, he thereby authorized his executrix and executors hereinafter named to invest a sufficient part of his estate in the purchase of so much more Bank Annuities, of the same kind as what he had then already purchased, as should be sufficient to answer the purposes hereinafter mentioned, as the same should become necessary; and he bequeathed unto his said executors the sum of 10,000*l.* current money of Jamaica, invested or to be invested in pursuance of the same power by them in the public funds, upon the following trusts: that is to say; upon trust, that his said executors should receive the yearly interest and dividends of the said sum of 10,000*l.* current money aforesaid, and pay and apply such part thereof as they in their discretion should think proper for and towards the support and maintenance of his daughter Anna Maria until the day of her marriage, or till she should attain the age of twenty-one years; and from and after her attaining such age or day of marriage upon trust to receive the annual interest and dividends of the said sum of 10,000*l.* current money aforesaid, and pay the same into the hands of Anna Maria, whose receipt alone notwithstanding coverture, it was declared, should be a sufficient discharge to his executors for the moneys therein expressed to be received; and he declared, that the said sum of 10,000*l.* current money or the annual interest or dividends thereof should not be subject to the debts, control, or engagements, of any husband she might marry; and from and after her decease, then in trust for her child or children in such shares and proportions as she should by deed or will, or any instrument in nature thereof, appoint; and for want of appointment, to and among all her children equally, share and share alike, with benefit of survivorship: but in case she should depart this life leaving any husband she might marry her surviving and without issue, then he declared, that his said executors should stand possessed of the said sum of 10,000*l.* current money, or the funds and securities, in which the same should be invested, in trust for the said surviving husband of Anna Maria, his executors, administrators, and assigns, for ever; and he directed his executors to pay, assign, and transfer, the same accordingly: but if she should

[*201] die under age and unmarried, then he *declared his will to be, that the said sum of 10,000*l.* current money or the funds or securities, in which the same should be invested, should revert to and become part of the residuum of his estate.

The testator then bequeathed to his executors a farther sum of

10,000*l.*, also of current money aforesaid, invested or to be invested in pursuance of the said power by them in the public funds, upon exactly the same trusts in favor of his daughter Jane Gardner, her children, and husband, in case she should leave a husband surviving her; and in the same event of her dying under age and unmarried he directed, that the said sum of 10,000*l.* current money aforesaid or the funds; &c. should revert to and become part of the residuum of his personal estate.

He then declared his will to be, that his said two daughters should be maintained and educated for the first six months after his death at the expense of his estate; and that the interest of their legacies should not be so applied till after the expiration of that time. He gave power to his executors to advance the principal of such respective legacy of his said daughters so marrying or any part thereof to her husband upon his giving security; and he gave power to his executors to change the funds; and declared his will, that his said respective daughters should upon attaining twenty-one or being married be entitled to receive any accumulation, which might have accrued or been made from the annual interest of their respective legacies or portions of stock, after discharging the expense of their respective educations; provided, that if his daughters respectively, after they should severally have attained the age of twenty-one years, should be desirous to have the several funds or parcels of stock, in which their several legacies of 10,000*l.* current money should be then invested, sold, and the moneys arising by the sale thereof invested in any other stock, or placed out upon any security, or to have the said money, after it should have been so invested or placed out upon any other stocks or security, called in and disposed of in any other manner, then that his trustees should accordingly sell and dispose of the said stocks or any part thereof, and invest the moneys arising from the sale thereof accordingly; which said other stocks, so to be bought, were to be to the same uses, intents, &c. as the said several sums of 10,000*l.* current money herein aforesaid, or the stocks, &c. in which the same were invested, were before directed, &c.

*The testator then devised and bequeathed all the residue [*202] of his estate real and personal to his son Francis Rigby Brodbelt, when he should attain the age of twenty-five years, to the use of him and his heirs, executors, &c. for ever. He appointed his wife Ann Gardner Brodbelt during her widowhood, and until she should be fully paid and satisfied the full and whole sums of money thereby bequeathed to her, and three other persons, executrix and executors in Jamaica; and he also appointed an executor in Great Britain, till his son should attain the age of twenty-five; and at that time he appointed his son sole executor. He appointed his wife during her widowhood only and the three executors in Jamaica guardians of the persons and estates of his daughters, until they should attain twenty-one.

The testator died on the 9th of December, 1795 ; leaving the three children mentioned in the will surviving.

Soon after his death his son having attained the age of twenty-five proved the will.

The testator had at different times previous to the date of his will made several remittances to England for the purpose of being invested in Bank 3 per cent. Annuities ; which sums were from time to time invested accordingly. The first remittance was to the amount of 1317*l.* 10*s.* sterling ; being the value of 1844*l.* 10*s.* Jamaica currency. That sum was remitted upon the 22d of January, 1783 ; and was invested in 2000*l.* 3 per cent. Consolidated Bank Annuities. He made several other remittances of various sums ; the last previous to the date of his will, upon the 26th of March, 1794 : so that at the date of the will he had 14,500*l.* 3 per cent. Consolidated Bank Annuities standing in his name, purchased with the money so remitted. Between the date of his will and his death another remittance was made, of 625*l.* sterling, being 877*l.* Jamaica currency, laid out upon the 26th of February, 1795, in 1000*l.* 3 per cent. Consolidated Bank Annuities ; and another of 500*l.* sterling, being 700*l.* currency, laid out at the same time in 795*l.* Bank 4 per cent. Annuities. At his death he had the last-mentioned sum of Bank 4 per cent. Annuities and 15,500*l.* 3 per cent. Consolidated Bank Annuities.

[* 203] * The bill was filed by the testator's two daughters, Anna Maria Raymond, who had attained twenty-one, and Jane Gardner Mackenzie, with their husbands, against their brother ; charging that the Plaintiffs are entitled to the dividends and interest of the said legacies of 10,000*l.* each from the time of the death of the testator ; and that the interest ought to be computed according to the legal rate of interest in Jamaica. The prayer of the bill was, that the Defendant may be decreed to transfer a moiety of the said 15,500*l.* 3 per cent. Consolidated Bank Annuities and 795*l.* Bank 4 per cent. Annuities to the Accountant General, in trust for the Plaintiff Anna Maria during her life, and upon her death on the other trusts of the will ; and that he may also lay out such a sum of money, part of the personal estate of the testator, as together with the value of a moiety of the said stock according to the prices, which the same bore at the time of his death, is equal to the sum of 10,000*l.* Jamaica currency, in the purchase of 3 per cent. Consolidated Bank Annuities upon the same trusts.

Then, after a similar prayer as to the other moiety on behalf of the Plaintiffs Mackenzie and his wife, the bill proceeded to pray an account of the dividends accrued due upon the said Bank Annuities since the death of the testator, and of the interest, which has accrued due upon the residue of the said two legacies of 10,000*l.* each, according to the legal rate of interest in Jamaica ; that the Defendant may be decreed to pay what shall be found due accordingly, and also to pay such sum of money, as the Court shall think just, for

the maintenance and support of the Plaintiffs for the six months after the testator's death ; an account of the personal estate, &c.

The Defendant by his answer stated, that he has since the death of the testator paid, laid out, &c. for the use of the Plaintiffs, his sisters, several sums of money on account of their legacies ; which, he believes, amount to a larger sum than the interest of their said legacies ; and he submits, they are not entitled upon any part of their legacies after the rate of interest in Jamaica ; and that according to the true construction of the will the amount of the current money, which was invested in the said 15,500*l.* 3 per cent. Consolidated Bank Annuities and 795*l.* Bank 4 per cent. Annuities was to be considered as applied in part payment and satisfaction of the said *several legacies of 10,000*l.*; therefore the said [* 204] stock ought to be received in part satisfaction of the said legacies as and for the sum of 16,377*l.* 7*s.* 6*d.* Jamaica currency ; being the amount of the current money, which was laid out in the purchase of such stock.

The answer also submitted, whether the Plaintiffs are entitled to any interest upon their several legacies during the first six months after the testator's death.

The *Attorney General* [Sir John Mitford] and Mr. Romilly, for the Plaintiffs. This legacy is, 10,000*l.* currency at the time of the testator's death. It is impossible, that he could have reference to the several sums he had remitted from time to time, from 1783 to 1794, and afterwards to the time of his death ; during all which time he was accumulating money, and had in view to transfer to this country a certain portion of it, to make a provision for his daughters in the Funds upon the trusts of his will. Till laid out in stock, it must bear the interest of Jamaica from the death of the testator ; which for the first six months, during which they are to be maintained and educated at the expense of his estate, is to accumulate for their benefit. The executor is to discharge himself of this legacy ; and he is entitled to the residue of the fund subject to the legacy. The testator certainly meant, that the stock should be vested in the trustees. His idea was, that the will would be executed, before the son would attain twenty-five ; and that those executors, whom he treats as trustees, would invest this fund in their own names for the benefit of these legatees.

Mr. Piggott and Mr. W. Agar, for the Defendant. The testator clearly meant, that the stock should be taken by these legatees at the expense, at which it had been purchased, at the cost of that stock. The will is very remarkable ; reciting the fact of the investments, and his intention, that the provision for his younger children should be equal portions of his Bank Annuities. Meaning to invest the legacy in stock, if he had laid out 10,000*l.* current money for each of them, it is clear, he must have meant them to take that. If so, it is equally clear, that it is only conditionally that he gives any thing more : if the investment is not completed, so much more as may be necessary to complete the investment shall be supplied out

of his personal estate. If completed, it is impossible to deny, that it would be specific. They could not be entitled to more [* 205] * than was purchased with that sum. In *Roberts v. Pocock* (1), though your Lordship held the legacies general, yet they were considered so specifically charged upon the fund, that it could not be disposed to the disadvantage of the legatees.

With respect to the question of interest, the common rule applies. The testator intends, that the investment shall be made at the end of six months, if not done before; foreseeing, that his executors could not in less time have remitted the money. There is no pretence for varying the general rule, that upon the balance the executor is to supply to make up the value he is to pay the ordinary interest: namely, 4 per cent., according to the course of the Court, not the interest of the island: *Stapleton v. Conway* (2). In *Malcolm v. Martin* (3) this precise question was determined by the present Master of the Rolls.

The *Attorney General*, in reply. Suppose no stock had been purchased, but the 10,000*l.* currency had been paid in Jamaica by bills on London, to be invested: it is true, the remittance being made from Jamaica, the time the bills had to run would have been so much loss of interest: but then they would have the profit of the exchange; which from Jamaica always exceeds the difference of interest.

LORD CHANCELLOR [LOUGHBOROUGH]. There is nothing fluctuating in this legacy. It must be 10,000*l.* currency. They could neither have more nor less. Suppose, the investments, the value of the stock purchased, had exceeded 20,000*l.* currency, they would have been limited: if the stock had risen to par, they could not have had more than 10,000*l.* a-piece currency. If it was specific, the value of the stock must be of necessity ascertained by the value at the death of the testator. But there is nothing specific in it. It is a legacy of 10,000*l.* currency each. They never can receive more: nor, as I apprehend, less.

Upon the other question, they must be maintained for six months at the expense of the estate. That is directed expressly.

[* 206] * The computation of interest will be upon the 10,000*l.*

Jamaica currency from the death of the testator till the time of the investment; and the dividends will go *pro tanto* in payment of that. They do not take the stock: but the stock stands as a security for the completion of the investment. Antecedent to the time the investment is completed the dividends are the executor's: but he must answer Jamaica interest, till the investment is completed. The cases referred to have no relation to this; which is distinct and specific. He directs 10,000*l.* currency to be remitted,

(1) *Ante*, vol. iv. 150. See, also, as to specific legacies, *Coleman v. Coleman*, *Chaworth v. Beech*, *Innes v. Johnson*, *Kirby v. Potter*, *ante*, ii. 639; iv. 555, 568, 748, and the note, vol. ii. 641.

(2) 1 Ves. 427.

(3) 3 Bro. C. C. 50; *Bourke v. Ricketts*, *post*, vol. x. 330.

to be invested. Suppose, it had been paid the first day after his death. They must remit it here: but if they execute it punctually, and remit it the first day, from the death to the payment of the bill they have the exchange: suppose, the remittance is not made till a year after the death: then the trust reposed in Jamaica upon his executors is not discharged, until the legacy is paid with interest according to the course of Jamaica.

This is not a specific legacy; and it is not correct to say, a legacy is either general or specific; for there is a general legacy not attended with the qualifications of a specific legacy, yet with an appropriation upon part of the property. That was the ground I went upon in *Roberts v. Pocock*; and that is the case here.

The Master must inquire, what sum of money would have been necessary to have invested in the 3 per cents. to have paid 10,000*l.* currency to each of the legatees at the time of the testator's death; and compute, what is due to the Plaintiffs upon their legacies, with interest according to such currency to the time the whole investment is made upon such sum as the Master shall find would have been necessary for the investment. An account must be taken of what has been laid out for the maintenance of the Plaintiffs since the expiration of the first six months after the death of the testator; during which they were maintained, and were entitled to be maintained, at the expense of his estate. All parties must have their costs.

1. As to the distinctions between general, specific, and demonstrative legacies, see, *ante*, the notes to *Coleman v. Coleman*, 2 V. 639.

2. The doctrine of the principal case, that legacies given expressly in the interest of a foreign country, will bear interest according to the rate of that country, so long as the money is there employed for the benefit of the testator's general estate, is considered as a doubtful question, in *Malcolm v. Martin*, 3 Brown, 53, where Lord Alvanley cites several decisions in plain contradiction to each other. The point was more recently under investigation before Sir William Grant, who, adverting to the principal case, (amongst others,) observed, that it was clear Lord Roeslyn did not mean to establish as a general rule, that colonial interest should always be given upon legacies given in colonial currency; and his honor, in the case before him, decided, that where the testator had assets both in the colonies and in this country, the legatees, if they prefer coming against the assets in this country, clearly cannot claim more than the ordinary rate of interest. *Bourke v. Ricketts*, 10 Ves. 334.

3. Unascertained, or general legacies, must be paid in the currency of the country in which the will was made, at all events, when the property was also situated there; and to show whether this was, or was not the case, evidence *dehors* the will may be admitted. *Lansdowne v. Lansdowne*, 2 Bligh, 92; *Picson v. Garnett*, 2 Brown, 47; *Cockerell v. Barber*, 16 Ves. 465.

HARRISON v. FOREMAN.

[ROLLS.—1799, DEC. 24; 1800, FEB. 4.]

A CLEAR vested interest not divested: the express contingency, upon which it was to be divested, not having happened.

Bequest to A. for life, and after her decease to B. and C. in equal moieties; and in case of the decease of either in the life of A. the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed, [p. 207.]

JOHN STALLARD, being possessed among other personal estate of 566*l.* annuities of 1778, by his will, dated the 13th of August, 1779, gave to Joseph Jennings and John Harrison 40*l.* per annum, part of the said annuities, in trust to pay the dividends and produce thereof, which should from time to time arise and become payable, to his cousin Mrs. Sarah Barnes during her life, exclusive of her marriage or any future husband, and not to be subject to his or their debts or control; and from and after her decease upon trust to transfer the said sum of 40*l.* per annum, or the stock or fund, wherein the produce thereof might be invested, to Peter Stallard and Susannah Snell Stallard, children of his (the testator's) cousin William Stallard, in equal moieties; and in case of the decease of either of them in the life-time of the said Sarah Barnes then he gave the whole thereof to the survivor of them living at her decease. He gave all the residue of his estate and effects of every kind to Elizabeth Stallard and Sarah Stallard, the children of his cousin Abraham Stallard, to be equally divided between them, share and share alike; and he appointed Jennings and Harrison his executors.

By a codicil, dated the 2d of February, 1781, among other things the testator revoked the disposition of the residue, and gave it in the same terms to the said Elizabeth Stallard and Sarah Stallard, and Mary Main, sen. and Mary Main, jun. equally.

By another codicil, dated 9th of February, 1782, the testator taking notice of the death of Jennings appointed another joint-executor with Harrison.

The testator died in March 1782. Susannah Snell Stallard and Peter Stallard died; the former in January 1784: the latter in December in the same year; both intestate. Sarah Barnes died in January 1797. The bill was filed by the executors of the testator; praying, that it may be declared, who are entitled to the said 40*l.* per annum Annuities, &c. The question was between the Defendant Foreman, administratrix of Susannah Snell Stallard and Peter Stallard, and the residuary legatees, claiming it as having fallen into the residue.

[* 208] * (1) Mr. Hood, for the Defendant Foreman, contended, that Susannah Snell Stallard and Peter Stallard were joint-tenants of the capital of the fund, subject to the life interest of

Sarah Barnes; but the Master of the Rolls intimated a decided opinion, that they were tenants in common.

It was then contended for the same Defendant, that, each of them having a vested interest in a moiety, it passed to their respective personal representatives; the event, upon which the legacy was given over to the survivor of them living at the decease of Sarah Barnes, not having happened; both having died during her life.

The cases cited were *Barnes v. Allen* (1); *Monkhouse v. Holme* (2); *Benyon v. Maddison* (3); and *Scurfield v. Howes* (4).

Mr. Stanley, for the residuary legatees. Those cases do not apply; and there is no case like this. Taking the whole sentence in the will, relating to this legacy, together, it is clear, the testator intended a personal benefit to Susannah Snell Stallard and Peter Stallard; and that neither should take any benefit, unless surviving Sarah Barnes; during whose life nothing vested, but their right was merely contingent. As she survived them both, the legacy upon her death lapsed, and fell into the general residue.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only question upon this will is, whether by the event, that has happened, the deaths of Susannah Snell Stallard and Peter Stallard in the life of Sarah Barnes, this sum of 40*l.* per annum annuities given after her death in their favor is undisposed of; or in other words whether the bequest is by these means put an end to and become absolutely void. Upon the first part of the will, if it stood without the condition annexed in case of the death of either of them in the life-time of Sarah Barnes, there could be no doubt, I suppose, that it would have been a vested interest in those two persons; for it is a bequest of these annuities to a person during her life; and after her decease to two given persons in equal moieties. If it rested upon those words, there could be no *doubt it [* 209] would upon the death of that person have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person entitled for life, or died before her. Then comes the condition annexed; making a disposition in a given event different from that, which would have been the effect of the first words. The contingency described in that part of the will never took place; there being no survivor of those two persons at that time. The question is then, whether this makes the whole void; as if it never vested at all.

It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared, that interest shall not arise. The case of *Mackell v. Winter* (5) is most analogous to this.

(1) 1 Bro. C. C. 181; *ante*, vol. iii. 208, n.

(2) 1 Bro. C. C. 298.

(3) 2 Bro. C. C. 75.

(4) 3 Bro. C. C. 91.

(5) *Ante*, vol. iii. 236, 536.

I held the interest absolutely vested in the surviving grandson. My decree was reversed: the Lord Chancellor holding two things; in both of which I had given an opinion; first, that it never did vest in the two grandsons or the survivor of them: 2dly, If it did vest, yet it sufficiently appeared upon the will, that the testator intended a survivorship to take place between all three, the grandsons and the grand-daughter, though it was not expressed. As to the first point, it does not bear upon this case. The Lord Chancellor was of opinion, the words were not sufficient to give a vested interest to the two grandsons for this reason; that nothing was given to them till their ages of twenty-one: but the capital and the accumulation are directed to be paid to them at that time and no other. His Lordship's opinion is expressly founded upon that. My opinion rested entirely upon the first point. I admit the absurdity of the intention: but that is no reason, why it should not prevail. I am very glad, the decree took the turn it did; for unquestionably it effected the real intention of the testatrix.

But without entering into that question, or commenting farther upon that case, to which it is my duty to submit, it is sufficient to say, that it is impossible, any doubt can be entertained [* 210] upon the * words of this will. Upon the principle of the

Lord Chancellor's opinion, that the words in that will were not sufficient to give any vested interest till the attainment of majority, my decree undoubtedly was wrong. But upon the doctrine held both by his Lordship and by me it must be determined, that upon the words of this will there was a vested interest, that was to be divested only upon a given contingency, and the question only is, whether that contingency has happened. No words can be more clear for a vested interest (a). Then the rule, that I applied in *Mackell v. Winter*, and that was admitted by the Lord Chancellor, takes place; that if there is a clear vested interest, the Court is only to see, what there is to take it away; and the only contingency is, that in case of the decease of either of them in the life of Mrs. Barnes the whole is to go to the survivor. Neither of them was living at her death. That rule, therefore, that I applied in *Mackell v. Winter*, and that I still think binding upon a Court of Equity, applies. There is a vested interest; and the contingency, upon which it is to be divested, never happened: the vested interest therefore remains; as if that contingency had never been annexed to it. Upon the principles laid down by the Lord Chancellor in *Mackell v. Winter* I am perfectly clear, his Lordship would have agreed with me in this case. I could illustrate the principle by putting the case of a real estate, instead of these annuities, given after the death of the tenant for life to these two persons and their heirs, as tenants in common; but, if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it

(a) In case of doubt, vested rather than contingent remainders, are favored. *Olney v. Hull*, 21 Pick. 311, 314; *Dingley v. Dingley*, 5 Mass. 535; *Bowers v. Porter*, 4 Pick. 198; *Shattuck v. Stedman*, 2 Pick. 468, 469.

so, there is no possibility of doubt, it would have been a vested interest in them, to be divested upon a contingency, which did not take place.

It is unnecessary for me to take notice of that case of *Allen v. Barnes*; as I have elsewhere (1) observed, that it is not correctly reported.

Declare, that these annuities of 40*l.* per annum were a vested interest in Susannah Snell Stallard and Peter Stallard, and now belong to the Defendants Foreman and his wife in right of the latter as their administratrix (2).

1. A BEQUEST amongst legatees "equally," (*Davenport v. Hanbury*, 3 Ves. 260,) or "share and share alike," (*Perry v. Woods*, 3 Ves. 206,) creates a tenancy in common; but there must be some such words of severance, or legatees must take as joint tenants, notwithstanding the leaning of Courts is in favor of tenancy in common. See, *ante*, the note to *Morley v. Bird*, 3 V. 628.

2. Legacies constituting vested interests in remainder after the death of a particular person, though subject to be divested, do not necessarily fail in consequence of the death of the remainder-man before that of the tenant for life; but, unless the survivorship of the remainder-man is made a necessary condition, (by a failure in which the legacy is expressly to be divested,) the interest will pass to his representatives. See note 3 to *Malin v. Keighley*, 2 V. 333.

DE BOUCHOUT v. GOLDSMID.

[* 211]

[1800, FEB. 8.]

UNDER a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. (a)

By the Civil Law, as well as the law of England, if a person is acting *ex mandato*, those dealing with him must look to his authority, (b) [p. 213.]

THE Plaintiff and his wife being possessed of 191 shares, standing in her name in the books of the London Assurance and the London Assurance of Houses and Goods from Fire, executed a

(1) *Ante*, vol. iii. 208, in *Perry v. Woods*.

(2) *Post*, *Smither v. Willock*, vol. ix. 233; *Stey v. Barnes*, 3 Mer. 335; *Sturgess v. Pearson*, 4 Madd. 411. For the rule, where survivorship generally, without reference to any particular period, is added to a tenancy in common, see, *ante*, *Russell v. Long*, vol. iv. 551; *Roebuck v. Dean*, ii. 265, and the note, 267.

(a) See Story, Agency, § 68, § 69, § 72, § 78; 2 Kent, (5th ed.) 625, 626; Chitty, Cont. (6th Am. ed.) 221, 222; *Haynes v. Foster*, 2 C. & M. 237; *Kinder v. Shaw*, 2 Mass. 398; *Jarvis v. Rogers*, 15 Mass. 389; *Odiorne v. Macey*, 13 Mass. 178, 181; *Rodriguez v. Heffernan*, 5 Johns. Ch. 429.

If an agent to whom goods are intrusted for a particular purpose, make sale of the goods in a manner or to a person not within the scope of his authority, the principal may disaffirm the sale, and recover the goods of the vendee. *Peters v. Ballistier*, 3 Pick. 495. See *Commercial Bank v. Kortwright*, 22 Wendell, 348.

(b) 2 Kent, (5th ed.) 625, 626; *Kinder v. Shaw*, 2 Mass. 398; *Van Amringe v. Peabody*, 1 Mason, 440; *Bowie v. Napier*, 1 McCord, 1; Story, Agency, § 72. A party dealing with a special agent is bound to inquire and ascertain the extent of his authority. *Snow v. Perry*, 9 Pick. 542; *Fisher v. Campbell*, 9 Porter, 210. If

power of Attorney, dated the 29th of September, 1794, to the house of Muilman and Co., as their agents and correspondents, by which the wife by the authority of her husband appointed Muilman and his partner Nantes, of London, merchants, jointly and separately her true and lawful attorneys or attorney for her and in her name to sell, assign, and transfer, unto any person or persons all or part of 161 shares in the capital or principal stock of the said Corporation, called the London Assurance, and all benefit arising thereby, to receive the principal and moneys arising therefrom and also the dividends due upon the said stock until transfer thereof, and to give acquittances for the same, and to do all lawful acts requisite for effecting the premises; thereby ratifying and confirming all her said attorneys or either of them should do therein by virtue thereof.

Under that power Muilman and Co., having upon the 25th of April, 1795, sold and transferred thirty of the shares, and being indebted to the Defendants, commission-brokers, in the habit of advancing money upon securities, applied to them for 5000*l.*; offering as a security for the re-payment, in addition to the security already in the hands, a transfer of the remaining 161 shares of the Plaintiff's stock and also a transfer of some Million Bank Stock. Transfers were made accordingly on the 25th of April, 1795. The shares appeared then standing in the name of the Plaintiff; and it appeared, that they were transferred under the power. In 1797 Muilman and Co. became bankrupt. At that time only 170*l.* 8*s.* 3*d.* remained due from them upon their general account to the Defendants.

The bill prayed a re-transfer of the shares, an account of the dividends received, &c.

The Defendants by their answer stated, that they had not any other knowledge, that the shares were not the property of the bankrupts, except, that they appeared standing in the Plaintiff's

[*212] * name and to be transferred under a power given for that purpose; and the Defendants did in fact understand and believe the said shares to be at the disposition of the said partnership: and that they had a right to transfer the same as a security to the Defendants. They insisted, it was not incumbent on them to inform themselves of the particulars relating to the said stock.

Nantes and two clerks of the Defendants by their depositions proved, that the stock was to be a security in addition to the other securities in the hands of the Defendants for the 5000*l.* and interest, and also for the balance due to them from Muilman and Co. upon their general account and such sums as should be afterwards advanced; and Nantes stated, that he considered them as having the absolute disposition of the stock.

The *Solicitor General* [Sir *William Grant*] and Mr. *Richards*, for the Plaintiffs. The Defendants are not entitled to hold this stock

the authority of the agent is derived from a written instrument, and that known to the person dealing with him, it must be strictly pursued, and cannot be enlarged by evidence of usage. *Delafield v. State of Illinois*, 26 Wendell, 192.

for the debt due to them from the bankrupts. A power to sell does not include a power to pledge, even as to personal chattels, which cannot be traced. It was determined as to factors in *Paterson v. Tash* (1); and has been recently recognized in *Daubigny v. Duval* (2). But this property can be traced. This power is merely to sell the stock and receive the money: but the transfer, that has taken place, is a deposit only. It was incumbent upon the Defendants, having notice, to look into the power: but upon those cases it is not necessary to fix them with notice, that Muilman and Co. were pledging stock not standing in their own names. The identity of the stock is clearly admitted.

The *Attorney General* [Sir John Mitford] and Mr. Stanley, for the Defendants. This question is very important to persons in the situation of the Defendants in the city; though the actual object of this suit is very trifling. The bankrupts carried on a very considerable business in receiving, transferring, and disposing of, in various ways, the stock of several persons abroad. It is true, the Defendants had what is generally deemed notice in Equity. All these powers of attorney are in precisely the same terms; enabling them to assign and transfer; and if the intention had been to give them authority to pledge the stock, the power would have been in precisely the *same words. The habit of raising money in [*213] this way by pledging stock is very frequent; and persons in the situation of these Defendants do not look at the particular authority, only to see, that there is a right to transfer and sell; and upon that power it is conceived, those who have it, may do any thing with the stock. As the Defendants had no information of the particular instructions, and as the Plaintiffs had by this power enabled the bankrupts to make a transfer, the Defendants had a right to consider them as warranted to make the transfer; and therefore the Plaintiffs must look only to Muilman and Co. for the consequences. Business of this description cannot be transacted, as it has been, if these persons are considered bound to inquire, whether, where people abroad have given power to transfer stock, those powers extend to a pledge as well as a sale. They might easily have evaded it by selling and transferring the stock into another name, and buying it back in their own.

LORD CHANCELLOR [LOUGHBOROUGH]. It has been settled with regard to goods; and there is no doubt, that if goods are consigned to a factor to sell, he cannot pledge them. It must be a *bona fide* sale for valuable consideration. I am not apprised of the late case: but I had taken it to be a pretty clear principle. The Defendants are certainly wrong in point of law. I take it, not merely to be a principle of the law of England, but by the Civil Law, that if a person is acting *ex mandato*, those dealing with him must look to his mandate.

(1) 2 Str. 1178.

(2) 5 Term Kep. B. R. 606.

second marriage. The most natural construction is that the decree has put upon the words. The word "secure" can mean no more than the words "go to;" which are used as to the other children. There is more reason to suspect, though there are not words sufficient, that they had never settled, whether there should not be a life interest in the whole.

The Defendant admits, there is no ground to impeach the release to Luders.

[*216] *Lord CHANCELLOR [LOUGHBOROUGH]. The decree, as drawn up, is certainly incorrect; for it directs the Master to settle one third agreeably to the letter, leaving the construction of the letter to the Master. Upon the Plaintiff's construction it comes to this; that, except the Defendant's life interest in one third, the whole is to be divided into fifths. Upon that construction the children of the second marriage, if less than four, would have less than a third.

The *Attorney General*, [Sir *William Grant*], in reply. But, unless they exceeded four, they would have as much as the other children; and it must be remembered, that the Defendant's fortune is left untouched. It is impossible upon the grammatical construction to refer the words "the latter," standing as they do, to the children of the second marriage. The other construction that they refer to the existing children is grammatical; and then "your former" must refer to the children by the second marriage; which is a possible construction.

Lord CHANCELLOR [LOUGHBOROUGH]. According to grammatical construction the words "the latter" would refer to the existing children, if they were not explained by what follows immediately, namely, "your former;" which must relate to the children then existing; and the idea was, that the children she had should be secured in one third at all events; that one third should be appropriated to the others, the number of whom was uncertain: but if there were more than four, they would have fared worse than the others, and they were her children, and the fortune her's: and undoubtedly, if the same idea of securing a third is to prevail as to the children of the second marriage, it would have had the effect, that has been observed, that it could not be touched. It was very natural to give it to the children of the first marriage immediately; for they could not be maintained for less than the interest. Therefore letting them have the interest, till they wanted the capital, was taking nothing from her. But it would have been very absurd for the sake of future children to abstain from taking the interest.

There is an inaccuracy in the decree in not explaining the construction of the settlement. It directs one third to go according to the terms of the letter; which according to this decree

[*217] *the Master is to construe. The direction for the account against Luders is a clear oversight. He must account for what has come to his hands from the foot of the account settled with the administratrix.

The decree, as finally drawn up, declared, that a settlement ought to be made by the Defendant Robert Anstey to carry into effect the terms of the letter, dated the 17th of April, 1791. An account was directed of the fortune, which Lucretia Anstey was possessed of or entitled to at the time of her marriage with the Defendant, come to his hands, and to the hands of the Plaintiff William Stratton Dundas Light, administrator *de bonis non* of William Light (who had attained the age of twenty-one); and an account of such parts of the estate and effects of William Light as came to the hands of the Plaintiff Luders, from the foot of the account settled with the administratrix, and the release, dated the 22d of October, 1793. Then after directing the costs to be paid out of the fortune of Lucretia Anstey, it was declared, that one third of the remainder of the fortune, to which he was entitled, as aforesaid, belongs to the Defendant Robert Anstey, in right of his deceased child; and that one fifth of another third also belongs to him in the like right; and that the remaining four fifths of that third will belong to the Plaintiffs William Stratton Dundas Light, Alexander Whalley Light, Lucretia Light, and Henry Light, at the death of Robert Anstey; and the Master is to see such two fifths settled on Robert Anstey for his life, with remainder to the said Plaintiffs; and that the remaining third belongs to the said Plaintiffs (the Lights) in equal shares.

The necessary directions were given as to the shares belonging to the Plaintiffs; of whom three were still infants: and upon the suggestion of the Attorney General, that the Defendant had maintained them, an inquiry was added, what he had expended, and what was proper to be allowed for their maintenance (1) (a).

SEE, *ante*, the notes to S. C. 4 V. 501.

(1) *Randall v. Morgan*, *post*, vol. xii. 67.

(a) As to maintenance see *Greenwell v. Greenwell*, *ante*, 199, notes (a) and (b).

WOLLEN v. TANNER.

[1800, FEB. 11.]

VOLUNTARY bond to pay to and among all such child or children of A. in such parts, &c. as the obligor should by deed or will appoint; and for want of appointment, and as to what should be unappointed, to and among all such child or children of A. as might survive the obligor. Appointment by will of the whole fund to one of six children established. (a)

Parties having claims under and against a will must elect, (b) [p. 218.]

JAMES WINTER by his bond, dated the 3d of July, 1786, became bound in the penalty of 1200*l.*, with a condition reciting, that by virtue of his marriage with Elizabeth, his then wife, he had received goods, chattels, and moneys, to a considerable amount; and that he was desirous, that the sum of 600*l.*, part thereof, should be disposed of to the several persons, and in such manner as thereafter mentioned; and therefore the condition was, that if the heirs, executors, or administrators, of James Winter should pay the said sum of 600*l.* after his decease unto and amongst all such child or children of Susannah Wollen (wife of Thomas Wollen the elder, and daughter of Elizabeth Winter) in such parts, shares, and proportions, manner and form, as James Winter should by any deed or deeds, writing or writings, or by his last will and testament, direct, appoint, give, or devise, and for want of such direction, gift, or devise, then if the heirs, executors, or administrators, of James Winter should pay the said sum of 600*l.* unto and amongst all such child or children of Susannah Wollen as might chance to survive James Winter, share and share alike, as tenants in common and not as joint tenants, then the bond should be void.

James Winter by his will, dated the 5th of March, 1796, among other things, after reciting, that under and by virtue of a bond made previous to or since his marriage with Elizabeth, his late wife, he had a disposing power of the sum of 600*l.* unto all or any one or more of the child or children of the said Thomas Wollen the elder by Susannah his wife, therefore by such power and all other powers enabling him so to do, he thereby gave and bequeathed the said 600*l.* to Thomas Wollen, son of Thomas Wollen and Susannah Wollen, to be paid unto him at the end of six calendar months next after his (the testator's) decease, with interest for the same at 5 per cent. from the day of his death; and he gave to four other children of Thomas Wollen, the elder, and Susannah Wollen 50*l.* a-piece, to be paid unto them, when the youngest should attain his or her age of

(a) See Sugden, Powers, (4th Lond. ed.) 484, ch. 9, § 3, div. 2; *Boyle v. Peterborough*, *Bishop of*, ante, 1 V. 299, note (a), and cases cited; 1 Madd. Ch. Pr. (4th Am. ed.) 318; *Hockley v. Maubey*, ante, 1 V. 152, note.

(b) See 2 Story, Eq. Jur. § 1075, et seq.; 4 Kent, (5th ed.) 58; Sugden, Powers, (4th Lond. ed.) 387, 388; *Butricke v. Broadhurst*, ante, 1 V. 171, note (a); *Blake v. Bunbury*, ib. 514, note (a); *Lady Cavan v. Putteney*, 2 ib. 544, note (a); 2 Williams, Executors, (2d Am. ed.) 1033-1040.

twenty-one years, with interest at the rate aforesaid from the day of his (the testator's) death.

The testator died upon the 2d of March, 1796. * At [*219] his death there were six children of Thomas Wollen the elder, and Susannah Wollen; all of whom were infants, when the cause was heard.

The bill was filed on behalf of the four children, legatees of 50*l.* a-piece against their two brothers, Thomas Wollen the younger, and William Wollen, and against the executor; praying an account in respect of the sum of 600*l.*, upon the ground, that the appointment was void; and also claiming the legacies of 50*l.* each.

Mr. *Lloyd* and Mr. *King*, for the Plaintiffs, confined themselves to the claim of the 600*l.*, as not being well appointed; giving up the claim of the legacies, in case they should succeed in setting aside the appointments (1).

The *Attorney General* [Sir *John Mitford*] and Mr. *Alexander*, for the Defendant Thomas Wollen the younger. The word "such" is applied to "child or children" as well as to the shares. The power is not to appoint to all and every the child or children. He might have appointed to a child in his life; and though that child had died in his life, he would have taken under and by force of the execution of this power, and not by the settlement. It might have happened, that only one child had survived him; and that one would have taken the whole. The meaning was, that his appointment should ascertain, who should take. If he made no appointment, and as to what should be unappointed, it was to go to such as should survive him. It is precisely the case of *The Duke of Marlborough v. Lord Godolphin* (2). If he makes an appointment, he creates an interest: if he makes none, it devolves to certain persons, and may only to one within the power. By the word "such" the power extends, as he states by his will, to enable him to appoint to any one. There might have been after-born children; which according to the construction now contended for would set aside an appointment executed by deed in his life.

Mr. *Lloyd* in reply. The distinction between this case and that cited is, that * there the word "all" does not occur. [*220] If it were not for that word, I admit, according to the case cited and *Alexander v. Alexander* (3), a case of very frequent reference, the proportions might have been varied: but even then no one child could have been absolutely excluded. In *Alexander v. Alexander* the Master of the Rolls was of opinion, that each must have something; and this case is much stronger; for the word "all" must be struck out. The first part of this bond, stating, that James Winter is desirous, that 600*l.* shall be disposed of to the several persons, &c., shows, the intention was not confined to one person. The question is, whether there is not a manifest intention, that all

(1) Upon the doctrine of election, see *Ward v. Baugh*, ante, vol. iv. 623, and the notes, 627; i. 523, 7.

(2) 2 Ves. 67.

(3) 2 Ves. 640.

the children shall have some benefit. The circumstance, that the bond is voluntary, can make no difference.

LORD CHANCELLOR [LOUGHBOROUGH]. If the testator had given to two or three of these children in his life, it would have satisfied the obligation of this bond. It is a disposition of his own property. He only bound himself to give for the benefit of his wife's grand-children 600*l*. It is to be paid unto and amongst all such child or children as he shall appoint; and he had a power to appoint by deed. If he had by deed given equal shares to all, and one had died, that share would have gone to the representative of that child; and there might, as has been observed, have been after-born children. The fault of the Plaintiff's argument is, that they stop at the word "all." They must go on and finish the sentence; and then it is all such child or children, as he shall appoint.

Alexander v. Alexander was a disposition by a father of portions to his children; the wife taking the fund for life, with power to divide it among them. Sir Thomas Clarke was very right, upon the supposition, that the father meant each to have something. But this is very different. This testator, under no obligation that this fund should go to the grand-children of the woman he had married, makes this disposition; reserving to himself a power to appoint, and to fix the objects of the appointment. They must take under the appointment, by which the interests are created. I think, he has understood his power rightly (1).

1. THAT under a power of appointment by will, reserved in the terms stated in the principal case, an appointment to one child only may be sustained, see, *ante*, note 3 to *Hockley v. Mawbey*, 1 V. 143.

2. As to the doctrine of election, see note 1 to *Lady Cavan v. Pulleney*, 2 V. 544, and the farther references there given.

[* 221]

FOXCROFT v. PARRIS.

[ROLLS.—1800, FEB. 6, 11.]

AN account of tithes is consequential upon the legal right; and therefore, if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed till the right is established at law.

Bill for tithes, [p. 221.]

Answer admitting the right to one third, and submitting to account, and claiming the other two thirds under a title derived from a grant by Queen Elizabeth, submitting to be examined upon interrogatories, but not setting forth a description of the lands. The Defendants having gone into evidence in support of their claim pressed to have the bill dismissed generally: the Plaintiff pressed for a general account. The Master of the Rolls decreed an account as to one third; and as to two thirds, the Plaintiff declining to try the right at law, dismissed the bill, [p. 221.]

THE bill was filed by the rector of Beauchamp Booothing in Essex, claiming tithes against the Defendants, occupiers of lands within the

(1) See the notes, *ante*, vol. i. 310; *post*, 853.

parish. The Plaintiff was presented to the rectory in July 1795. The bill prayed an account of all tithes, both great and small; waiving all penalties.

The answer admitted, that the Defendants are occupiers of several farms, lands, &c. within the parish; and stated, that the Defendants have always been ready and willing to pay to the Plaintiff or to make him satisfaction for such part of the said tithes as they are advised is due from them to the Plaintiff: and they admit, that there is a large sum of money due for the shares of the said tithes; to which the Plaintiff is entitled, as after-mentioned. They insist, and hope to be able to prove, that two parts, the whole into three equal parts to be divided, of all tithes whatsoever, as well great as small, arising, growing, renewing, and increasing, from and upon all and every the said lands in the occupation of the Defendants respectively as aforesaid, and situate within the said rectory and parish, were from time out of memory before and at the surrender of the late dissolved priory or monastery of Colne in the county of Essex and of the possessions thereof into the hands of King Henry the VIIIth, parcel of the possessions of the said priory; and were held and enjoyed by the said priory during all the said time; and the said priory was dissolved by virtue of the said surrender and of the act of Parliament 31 Hen. VIII. They insist, that the said two parts of all said tithes were afterwards granted by Queen Elizabeth to certain persons, from or under whom the present owners of the said lands now in the occupation of the Defendants claim to be entitled to such two parts of the said tithes.

The answer then insisted, that by virtue of the said act of Parliament and the priory having during all the time aforesaid held and enjoyed the said two parts of all the tithes great and small, &c. and also by virtue of the said grant of such two parts of the said tithes by Queen Elizabeth and of the title derived from thence to *the present owners of the said lands, under whom the [*222] Defendants occupy the same, as aforesaid, the said lands became, and ever since the passing of the said act of Parliament have been, and now are, acquitted and discharged of and from the payment of such two parts of all tithes whatsoever to the rector: but they admit, that the rector is entitled to the other third part of all the said tithes. They believe, that no more than one third part of the said tithes has ever been demanded or paid to the rector since the surrender of the priory, and the said act of Parliament.

The answer then insisted, that for the reasons aforesaid the Defendants ought not to pay to the Plaintiff more than one third of the tithes demanded by the bill. They say, they have always been, and are still, ready and willing to account with and pay to the Plaintiff one third part of the said tithes, or to make him a reasonable compensation for the same. They submit to be examined upon interrogatories touching the quality and description of the said lands in the occupation of the Defendants respectively, as aforesaid, and the

tithes of all and every the titheable matters and things, which have arisen upon the said lands or any part thereof, since the Plaintiff became the rector, as the Court shall direct.

When this answer came in, the bill was amended by inserting, that the Defendants pretend, that Eliab Harvey, George Pochin, and Richard Birch, are in some manner entitled to two third parts of all the said tithes ; and that they, the original Defendants, have respectively paid and accounted with them for such two third parts : but as to the particulars of such title to the said two third parts of the said tithes the said Defendants refuse to answer.

The landlords, being made parties to the amended bill, by their answer stated, that the other Defendants held as tenants to them certain farms, lands, and premises, situate within the said rectory and parish ; and that a considerable part of such farms, &c. consisting of 490 acres or thereabouts, are, as the Defendants believe for the reasons after mentioned, exempt from the payment of tithes or any composition in lieu thereof, save as after-mentioned.

[* 223] *The Defendants then insisted, as landlords and proprietors of the said farms and lands consisting of 490 acres, &c. that two parts of all tithes, as well great as small, arising, &c. from and upon the same and every part thereof, were from time out of memory before and at the surrender of the priory of Colne, &c. parcel of the possessions of the said priory, &c. as stated in the other answer. They farther insisted, that two parts of all the said tithes were afterwards granted by letters patent 5th and 6th of Philip and Mary and 11th of Elizabeth, to Richard and Mary Weston and John Wiseman respectively ; from or under whom these Defendants as the present owners of the said lands, now severally claim to be entitled to such two parts of the said tithes.

They then insisted, as the other answer, that by virtue of the said act of Parliament and the said priory having during all the time aforesaid held, &c. the said two parts of all the said tithes, &c. and by virtue of the said grants, &c. and of the title derived from thence to these Defendants respectively, as the present owners of the said lands, under whom John Eden Parris and the other Defendants (naming the other tenants) occupy the same, as aforesaid, the said lands became, and ever since the passing of the said act have been, and now are, acquitted and discharged of and from the payment of such two parts of all tithes whatsoever to the rector ; admitting his title to the remaining third ; and stating, that they have been informed and believe, no more than one third has ever been demanded or paid by or to the rector since the surrender of the priory and the said act. They deny, that they or any of them have ever received any part of the tithes due in respect of the said lands, or that the other Defendants have paid or accounted with them for the said tithes ; but admit, that the rents are proportionably higher by reason of the exemption claimed by the Defendants from the payment of more than one third of the tithes to the rector.

The Defendants went into parol evidence, that the occupiers have

paid only a thirtieth and not a tenth as a satisfaction for all tithes; and that tithe in kind was never taken from the land in the occupation of the Defendants. They also produced a copy of the record of the grant from Queen Elizabeth to Wiseman, comprising all the tithes of the manor of Long Barnes within the parish of Bishop Rodinge; a conveyance in fee, dated the 7th of June, 23d Elizabeth, of two parts of all the tithes by Wiseman, another conveyance of the manor and two parts of the * tithes, dated the 19th of June, 1668, and several other conveyances, by which they derived their title, down to the present time. [*224]

(1) Mr. Romilly and Mr. Leach, for the Plaintiff. This defence is the same as a prescription. The present Attorney General argued the late case of *Strutt v. Baker* (2), before the Lord Chancellor, as a case of prescription. How is the rector to meet such a case? It is necessary for the Defendants to state a title to repel the title of the rector, and to state the lands, over which he claims a prescription. In *Gough v. Collins* (3), an account of tithes was decreed, because the Defendants had not set forth the lands, in respect of which they claimed a *modus*. It is perfectly settled, that where the Defendant sets up an exemption, he must describe the lands, in respect of which he claims it. The greatest injustice will arise, if the Defendants can claim an exemption in this loose way. A decree for an account in this cause can never prejudice them in another cause. The bill is filed upon the legal title of the rector, without any knowledge of this claim of title to tithes. Why should the Plaintiff do more than set out his own title? A decree, such as the Defendants desire, would overturn the course of the Court of Exchequer.

Mr. Piggott and Mr. Thompson, for the Defendants. This bill ought to be dismissed, upon the authorities, and recent authorities: *Strutt v. Baker*; which was decided upon recent cases in the Court of Exchequer, and in which the question was precisely the same as in this cause. The bill was dismissed upon the plainest principle; that the account is consequential upon the legal title; and it is the province of a Court of Law to decide it, if the title is disputed. In all these cases the Plaintiffs claimed, either an issue, or that the bill should be retained: but neither was granted; and the bill was dismissed in all. Those cases are collected, and the principles extracted from them, in the new edition of Bacon's Abridgment (4); and all the objections now made are there answered. To * *Scott v. Airey* (5) and *Edwards v. Lord Vernon* (6), [*225] another case is there added, *Mawbey v. Edmead* (7), illus-

(1) The arguments for the Plaintiff *ex relatione*.

(2) *Ante*, vol. ii. 625.

(3) 16th Feb. 1785; cited from Cases in Parliament.

(4) Vol. v. tit. "Tithe." The Court expressed a very favorable opinion of Mr. Gwillim's edition.

(5) In the Court of Exchequer, 1779; cited, *ante*, 180, in *Rose v. Calland*, and in *Strutt v. Baker*, and *Nagle v. Edwards*, 3 Anst. 702.

(6) In the Court of Exchequer, 1781; 3 Gwill. 1177, note.

(7) Hilary Term, 1784.

trating the distinction between a *modus* and an absolute unqualified denial of the right to tithes. Upon these authorities the principle is clear, that where the title to the tithes is disputed, that is sufficient to oblige the Plaintiff to establish it at law: the jurisdiction of this Court being merely consequential upon the legal title: viz. to take the account. If the title is denied, there is no difference between tithes and any other property. It is nothing but an ejectment bill, if the title is disputed. For a long time it was lawful for lords of manors to endow religious houses, and even for a long time, though not so long to endow laymen. There is a total want of precision in considering this as a *modus*. It is a total denial of title. As to the objection, that the answer does not set forth a description of the lands, if the answer is not sufficient, they ought to have excepted. In *Gough v. Collins* the Defendants had other lands in that parish, with respect to which they did not claim a *modus*; therefore there was necessarily a general account; because the right to tithes in general was admitted. This bill ought clearly to be dismissed as to the two thirds of the tithes; and upon the authority of *Strutt v. Baker* it ought to be dismissed generally. There is a remarkable correspondence between the cases; and the answer in that had taken exactly the same course as in this. No case can be more destitute of equitable grounds. A mere dry question of legal title appears upon this record. Bills of this sort have been uniformly dismissed by the Court of Exchequer; and the Lord Chancellor in that instance adopted the distinction fully.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am not satisfied as to *Strutt v. Baker*. Why am I not to give an account of that, to which the Plaintiff has a right? Can the Defendants meet the rector by saying, that, not disputing his title, he has no right to the account? You contend, that if you satisfy me, the Plaintiff has no right to the account of the two thirds he shall not have an account of the one third, which is not disputed.

But without entering into the question before the Lord Chancellor in *Strutt v. Baker*, can you upon this answer contend, [*226] that *the bill ought to be dismissed? Upon this answer you admit the Plaintiff's title to one third of the tithes, and submit to be examined upon interrogatories. How can you after that submission have the bill dismissed? There are only two ways of meeting a bill for tithes, where the right is admitted; either by saying, they are ready to account for them, or, that they have set them out. He cannot bring his action, till he knows, what his tithes are. He has a right to know, what they are. I am therefore very clearly of opinion so far with the Plaintiff, that the Defendants must upon this submission come to an account as to one third.

It is a mistake to say, that in *Garnons v. Barnard* (1) the bill was dismissed. The Lords were of opinion, he had not proved his

title sufficiently : but they granted an issue. The impropiator had the common law title. The vicar filed his bill for agistment tithe. The Defendant as impropiator insisted, the vicar was not endowed of those tithes ; and claimed them as impropiator ; insisting by his answer, that the Court ought either to dismiss the bill entirely, or grant an issue. The Court of Exchequer thought, the vicar had proved his title against the rector : the House of Lords thought, he had not ; and that it was a fit case for the decision of a jury ; the appellant prayed, that the decree should be reversed, or an issue directed ; and the House of Lords granted an issue. How could that be, if it is a general rule not to retain the bill, because the title is denied ?

Of what use is it, that I should dismiss this bill, that the Plaintiff may file another bill for an account of one third of the tithes ? When he has proved his right, which he must, why should he not have the account upon this bill as well as upon any other ? I admit, the title must be established, if it is denied : but if it is established, why should not the account be taken upon that bill as well as upon another ? You admit his title to one third ; but desire, that he shall not have an account of that upon this bill. I certainly shall not decree the two thirds, till his title is established.

For the Defendants. An issue was directed in that case upon a very different ground. The principle was, that as the rector has the title at law, the Court of Exchequer were wrong in deciding without *giving him an opportunity of trying [* 227] that title at law. In the clearest case of a *modus* the Court will not decide without a trial, if desired. The other cases are uniform in recognizing the principle, and acting upon it, that where the title is legal, the Court will dismiss the bill. As to the objection, that the Plaintiff ought not to be put to file another bill, it might be more convenient in many cases to prevent a new bill. The Lord Chancellor in *Strutt v. Baker* expresses his satisfaction at those cases in the Court of Exchequer. As to the two thirds there can be no doubt, the bill must be dismissed : as to the other third, the precise point was before the Lord Chancellor in that case ; and his Lordship rejected the idea of decreeing partially upon the subject not in dispute, deciding against the Plaintiff upon the rest. The actual payment of one third is very strong, much stronger than the case of retainer. Another question is, whether the Defendants ought to have been put to the necessity of exposing all their title-deeds to this Plaintiff, to see if he can pick a hole in the title, and undo an enjoyment of such a course of time, from the reign of Queen Elizabeth. The grant of Queen Elizabeth to a layman put a complete end to the title of the rector ; and the production of that grant, and the evidence, that they had not paid more than a thirtieth, would have been sufficient. Upon such a case the Plaintiff would have been nonsuited at law.

Mr. Romilly, in reply. It is a new principle, that, because a Plaintiff has demanded something more than he is entitled to, a

Court of Equity is not to give him that, to which he is entitled. *Strutt v. Baker* is the only case bearing the least resemblance to it; for in all the rest the Plaintiff demanded the whole tithe; and the Court being of opinion, that he was not entitled to the whole, or at least not without a trial at law, dismissed the bill. But this case is very different from *Strutt v. Baker*; for this Plaintiff did not know the claim of the Defendants, when he filed his bill upon his right to tithes: but in that case the Plaintiff himself stated the claim of the Defendant; and he brought the bill on purpose to try it. These Defendants do not pretend, that they have set out their tithes. Is it a ground for refusing the Plaintiff a decree, that they say, they are willing to account? The common course in the Court of Exchequer is to move, that the Defendant may be permitted to pay in what he admits to be due; and then the Plaintiff goes on [* 228] at the peril of costs, * if he does not establish his right to more. To oppose the common law right of the rector there must be some defence stated upon the record; otherwise the Plaintiff does not know, what is the matter in issue. I repeat, that this defence is the same as a prescription. The present Attorney General argued *Strutt v. Baker*, not as being like a prescription, but as being exactly a prescription; contending, that there could not be a prescription *de non decimando* in a *que estate* (1). The nature of prescription is, that from long usage some grant must be presumed. It proceeds upon the presumption of some grant of the tithes in very remote times to the owner of the land. Why not presume a grant of two thirds as well as of all the tithes? It is only upon that ground that *Edwards v. Lord Vernon* (2) and *Mawbey v. Edmead* have any application. Then the person, who prescribes, must state upon the record either at law or in equity, what are the lands, for which he claims prescription. So in the case of a *modus*, in point of principle it is exactly the same as a prescription. No distinction is shown between a claim of exemption from all tithes, or of a *modus* for a particular farm, and the case, upon which the Court has now to decide. It is perfectly settled, that where the Defendant sets up any exemption, he must state upon the record the lands, in respect of which he claims to set up that ancient composition, that he calls a *modus*. It would be the greatest injustice, if a Defendant could state an exemption in this loose way, then prove it, without its being possible for the Plaintiff to know, to what it was to apply, and then desire to have the bill dismissed, or an issue. There must be two facts ascertained: first, what are the lands; secondly, whether they are exempt from tithe. In *Strutt v. Baker* the whole of the defence was stated upon the record; and the Lord Chancellor relies upon that. That case is totally different in that respect. This Plaintiff is brought here, knowing nothing of the case previously; and then is told for the first time, that he may, if he pleases, have an issue.

(1) *Ante*, vol. ii. 627.

(2) 3 Gwill. 1177, note.

The evidence is open to much observation. Some title-deeds are now produced as to the lands of Pochin, for which this exemption is claimed, of which no one knows any thing at this moment. Those deeds prove the lands to be 90 acres; but the witnesses speak of only 77. Nothing is desired but an account of tithes; which is only for two years. There is nothing to prevent their trying * their title; and in *Gough v. Collins* the ground was, [* 299] that it could not possibly prejudice the title: but the decree for an account was made only to give the Defendant an opportunity of trying his title in a future suit. It is not necessary for the Plaintiff to desire the Defendants to set out their defence. The objection, that the Plaintiff ought to have excepted, because the Defendant to a bill for tithes has not stated his defence properly, is perfectly new. Is the Plaintiff to require him to state it properly? Could he be so advised? There has been a case, where a rector filed a bill for tithes: there was a good defence: but the Defendant could not frame his defence, as he wished: an imperfect answer was put in; and the Plaintiff replied to it: the Defendant prayed to be permitted to amend; stating, that he had been deceived by this mode: but the Court refused to permit him to amend. That is the argument here. Can the Court say, that because the Plaintiff has not excepted, therefore the defence must be considered as well stated? It would overturn all the course of pleading. Some of the Defendants speak of their lands: others, of part of their lands. Besides that, they claim as to particular lands. All the lands the witnesses speak of do not amount to any thing like 490 acres.

It is impossible for them even to have an issue. As to an action upon the statute (1), it is quite new in this sort of case to insist, that the rector shall bring an action upon the statute, before he shall be entitled to file a bill. The first piece of evidence is the grant of Queen Elizabeth, upon which they rely. It is quite clear, the Queen could not grant the whole tithe; for they admit the Plaintiff's title to one third. They say, it is a grant of the tithes of the manor of Long Barnes. That manor appears only on their deeds. There is no proof, that there is any such manor as Long Barnes. In one of the latter deeds it is called the manor or reputed manor. There is no evidence whatsoever as to that manor. Upon *Gough v. Collins* and the other cases the evidence ought to be entirely laid out of the case; and there ought to be neither issue nor inquiry; but the Court ought to decree an account of tithes. Above all, the Plaintiff would choose to have the bill dismissed, rather than an inquiry, to what lands in the occupation of the Defendants the exemption applies.

* MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. [* 230] This case has been extremely well argued; and was much pressed on both sides. For the Plaintiff it was contended, that upon the defect of the answer I should proceed to give him an account

of tithes for two years; as if no evidence was produced sufficient to entitle the Defendants to prove, if they can, that the Plaintiff is not entitled to two thirds; and I will first consider that point, before I proceed to the objections made by the Defendants, insisting, that the Plaintiff is not entitled to any tithes at all.

The Plaintiff does not seem to be doubtful, as to what the lands are, which the Defendants occupy: but he claims tithe of all the lands, of which they are in the occupation. They could not conceive, that the rector could have any doubt as to what lands they occupy. They put in an answer, admitting, they are occupiers of lands within the parish. They certainly do not state what those lands are; for independent of the practice of the Court, no common man could think it necessary. There is nothing in the bill pointing to any doubt. But they admit, they have several farms, lands, &c. within the parish; and they admit the Plaintiff's right to one third of the tithes of all the lands they occupy: but they insist, that their respective landlords are entitled to two thirds of all the tithes of all the lands in their occupation. In consequence of this the bill was amended: the Plaintiff finding, they admitted his title to one third, meaning to insist upon a right in their landlords to the other two thirds, as belonging to them and not to the Plaintiff. He then makes the landlords parties; and introduces into the bill their allegation; and desires that they may set forth what they claim. The landlords by their answer state, that the other Defendants hold as tenants to them certain farms, lands, &c. within the parish. They admit him to be entitled to one third of the tithes; but insist, that a considerable part of such farms, lands, &c. consisting of about 490 acres, are exempt from the payment to the rector of more than one third; they as landlords claiming the other two thirds.

To this answer the Plaintiff replies; and it is said to be the course of the Court of Exchequer, that if the Defendant does not state particularly such lands, out of which he claims tithes, or a portion of the tithes, the Plaintiff is under a difficulty, that the Court [* 231] *will not impose upon any Plaintiff: therefore if he takes issue upon the answer, and lets the Defendant go to issue and examine evidence, still he is entitled to a decree for tithes in kind. Cases may have happened, where the Plaintiff has sustained an injury for want of the Defendant's going into such a statement of the particulars of his defence: but this is such a trap for a Defendant, as I sitting here will never permit, to take issue upon the answer, let the Defendant go into evidence, and then say, it is no matter what the evidence is; it is not stated so, that the Plaintiff can pray a decree. It would have been better to have set down the cause upon bill and answer. Instead of that he has taken issue; and a great deal of evidence has been gone into; and the question now is, whether it is to be read? I cannot say, a *prima facie* case is not made by the Defendants; and, because they have not set forth a particular description of the lands, the Plaintiff is to have a decree.

As to *Gough v. Collins* (1), Lord Thurlow had great doubt whether Sir Thomas Sewell did right in making the decree without farther inquiry. I should not satisfy my conscience by making a decree as the Plaintiff desires. I will not conform to those cases, if I see, injustice will arise by so doing. The Plaintiff cannot complain, that the Defendants have not set out that, which it is to be presumed they would, if called for. I am of opinion therefore, that the Defendants have properly given *prima facie* evidence, that two thirds of the tithes belong to the landlords; at least, that they have laid a sufficient ground to admit them to call upon him to make good his title in a Court of law to the two thirds. They submit to be examined upon interrogatories. If the Plaintiff wished to know, what the lands were, why did he not call for that examination? No: he says, he means, they shall not set them out, till it is too late.

The next consideration is, how far are the Defendants justified in what they desire, after the evidence they have gone into. I do not mean to decide upon the title, as set forth. That must be the subject of farther inquiry in an issue or an action. But they say, notwithstanding that submission in the answer, that the bill should be dismissed, not only as to the two thirds, but also as to the one third. Without entering into the question of what was in contest * before the Lord Chancellor in *Strutt v. Baker*, I [* 232] cannot think, that where there is such a submission as to one third of the tithes, I am to dismiss the bill. It does not appear, and the Counsel cannot inform me, that there was such a submission in *Strutt v. Baker*. If there had been, I think, the Lord Chancellor would have acted upon it. But there is that submission in this case; and I will bind them by it.

The question then is, whether they have made such a case as entitles them now to dismiss the bill as to the two thirds. I believe, there may have been instances, in which it was so clearly a case at law, that the Court may have left the Plaintiff to make out his right at law, before he could call for an account. The principle is clear, that the account only arises upon the legal right; and if there is *prima facie* evidence against it, it must be proved at law, if there is the least doubt, before the Court will act upon it. I never will in such a case decree an account, if the least doubt appears against the legal right, before it is established. *Garnons v. Barnard*, the last case upon the subject, subsequent to all the others, is decisive against the claim to have the bill dismissed. The bill was filed by the vicar, who has not the common law right, against the impropriator, who has. The Court of Exchequer were satisfied, that the vicar had made out a sufficient case to entitle him to the tithes demanded. They thought, he had proved a legal right. The House of Lords thought, it was not sufficiently made out; at least, not proved, as it ought to be in point of law, namely in a Court of law;

and the impropiator insisted, that therefore the bill ought to be dismissed, or the legal right established in a Court of law. The House of Lords agreed so far with the vicar, that they did not dismiss the bill, and leave him to make out his right, as he could: but they granted an issue. It is now said, the issue was determined in favor of the vicar (1).

To apply the principles of that case to this: there is *prima facie* evidence given to me, that as to all the lands in their possession, or the greatest part of them they have a grant under Queen Elizabeth. Till the lands are set forth it would be hard: when they are set forth, what will be the hardship? There seems to be an [* 233] *objection made by the Plaintiff's Counsel to an action upon the statute. Why is that? The point, I think, would arise in an action upon the statute better than in any other way. But it is indifferent to me, whether it is tried in an action or an issue.

I am inclined to direct an account of one third of the tithes, and that the Defendants shall set forth the quantity, quality and description, of the several lands in their respective occupation, and to retain the bill, with liberty to bring an action upon the statute; the Defendants to admit, they had set out one third, and had substracted two thirds. What objection is there to that?

For the Plaintiff. If there is the slightest evidence, we all know, the jury will decide against the parson. The Plaintiff would prefer to have the bill dismissed.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. It was very easy for him to have called upon the Defendants to state the lands. I cannot satisfy my conscience in giving him an account of two years' tithes, to which I do not think him entitled. It would be catching the Defendants. Therefore if he will not take an issue, I will direct the account as to the one third, and as to so much as seeks an account of the two thirds, dismiss the bill. It is wild to suppose, the Defendants have not a right to have the question as to the two thirds tried at law.

The account was directed as to one third; and as to two thirds the bill was dismissed; the Plaintiff declining to go to law (2).

SEE, *ante*, the notes to *Strutt v. Baker*, 2 V. 625, and those to *Rose v. Calland*, 5 V. 186.

(1) It was so said at the bar.

(2) Upon the question, whether alienation may be presumed in the case of a lay impropiator, see *Rose v. Calland*, *ante*, 186, and *Berney v. Hervey*, *post*, vol. xvii. 119.

IN THE MATTER OF BANKRUPTCY.

LORD CHANCELLOR.

[1800, August 12.]

WHEREAS, by the practice which hath many years prevailed, the Solicitors, on suing out Commissions of Bankrupt to be executed in the country, have been at liberty to name their own Commissioners to execute the same; two of whom are nominated Esquires, and are considered to be Barristers, resident at or near the place where the said Commission is to be executed, and also to three Solicitors or Attorneys: And whereas it appears, that in many instances, improper persons have been named in such commissions as the Quorum Commissioners, they not being Barristers; which is contrary to my intent and meaning,

I do therefore order, that in future the Solicitors, in delivering to my Secretary of Bankrupt the names of the Commissioners to be inserted in the commission applied for by them, do insert in such list the names of two Barristers, resident at or near to the place where such commission is to be executed; and that, on no account, they do insert the name of any gentleman to be nominated as a Quorum Commissioner unless he be a Barrister.

LOUGHBOROUGH, C.

AN application to dispense with this order, in proper cases, will be complied with; but a commission not executed in conformity with the order, no dispensation therewith having been obtained, will be superseded, with costs. *Ex parte Conway*, 13 Ves. 63. See, relative to this matter, the 21st and 22d sections of the consolidated Bankrupt Act, 5 Geo. IV. c. 98.

SITTINGS AFTER HILARY TERM.

[40 GEO. III. 1800.]

TOULMIN v. PRICE.

[ROLLS.—1800, FEB. 13, 17.]

THE Annuity Act with respect to annuities subsisting at that time only restrains the action, till its provisions are complied with; not limiting the time; and does not, as in the case of subsequent annuities, make the security void. In the former case therefore the bond being by accident lost, the annuitant was admitted a creditor for the arrears of the annuity, the real debt in Equity.

A bill in Equity not sufficient to prevent the operation of a fine at law, [p. 238.]

The jurisdiction assumed by Courts of Law, dispensing with *proferat* in the case of a lost bond, does not oust the equitable jurisdiction, [p. 239.]

No execution for the penalty of a bond securing an annuity; but only *toties quoties* for the accruing payments, (a) [p. 239.]

No relief in Equity upon a promissory note void at law for want of a stamp, [p. 240.]

THE bill was filed by Hugh Norris, claiming under a residuary disposition in his favor by the will of his brother Henry Norris, against the surviving executor. After the death of Hugh Norris the suit was revived by his administrator. The Master by his Report allowed a claim made by Dagge More against the estate of Hugh Norris under the following circumstances.

The claim was originally made before the Master for 462*l.*, the arrears of an annuity of 40*l.* granted to More by Sir Alexander Gilmour, Bart. and Hugh Norris, the former as principal, the latter as surety, in consideration of 220*l.*, secured by their joint and several bond and warrant of attorney, executed in 1776, before the Annuity Act (1), after giving credit for 20*l.*, received for two quarterly payments of the annuity, due on the 13th of October, 1776, and the 13th of January, 1777, and also for 198*l.* received at sundry times from the estate of Sir Alexander Gilmour on account of the annuity. The claim was afterwards reduced to 440*l.*, the penalty of the bond; which sum the Master allowed him.

Exceptions were taken to the Report by the creditors for allowing this claim: first, because the bond and warrant had not been produced before the Master; nor any sufficient evidence laid before him, that they had been destroyed, and were not in existence.

[* 236] * Secondly, that Norris, being after the date of the bond

(a) See 2 Story, Eq. Jur. § 1313, 1314; *Skinner v. Dayton*, 2 Johns. Ch. 535; 1 Fonbl. Eq. b. 1, ch. 3, § 2, note (d); Ib. b. 1, ch. 6, § 4, note (b); *Sloman v. Walter*, 1 Bro. C. C. (Am. ed. 1844,) 418, 419, and notes; *Livingston v. Tompkins*, 4 Johns. Ch. 425; Chitty on Contracts, (6th Am. ed.) 863, and cases cited in notes.

(1) 17 Geo. III. c. 26, repealed by the act 53, Geo. III. c. 141; see the note, ante, vol. ii. 36.

imprisoned for debt, in 1778 took the benefit of an Insolvent Act; under which he was discharged from all his debts.

Thirdly, that no memorial of the bond had been enrolled, pursuant to the Act of Parliament.

The two first grounds of exception were disposed of by an issue, directed by the Master of the Rolls, to try, whether Norris was at the time of his death indebted to More in any and what sum upon the annuity; upon which More was to be the Plaintiff at law; and was directed to admit, that Norris was discharged under the Insolvent Act; and the Defendant was to be restrained from setting up any defence for want of registration of the annuity, without prejudice. The verdict upon the trial of that issue was in favor of the Plaintiff More for the full penalty of 440*l*.

The question as to his right to that sum came on by consent upon the exception, and a petition of several creditors upon the estate of Norris; praying judgment upon the exceptions and an application of the assets. It appeared upon the affidavit, that More had delivered the bond and warrant to White, to deliver it to Blake, an attorney, to act upon it as his attorney; and White instead of that gave it to Collins, to be returned to More; and he went into Wales, and died; and the bond and warrant were lost. Judgment had not been entered up.

Mr. *Grant*, Mr. *Richards*, and Mr. *Martin*, in support of the Exception. Mr. *Fonblanque*, for the Annuitant.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This comes on in rather an irregular way: but in order to save the expense of filing a bill to establish this demand against the assets of Hugh Norris, it was agreed to bring it on by petition; and that every advantage, that could arise upon a bill, in order to remedy the defect of the non-registration of this annuity, should avail the annuitant to establish his demand.

In point of law both were principals in this bond; which was a common bond to secure an annuity granted before the Annuity Act. The payments that were made upon it, and the other facts, the delivery of the bond to White, to deliver to Blake, to act upon it as an attorney, &c. appear by the affidavit of More; and the whole benefit of that is to be *given to him; as if it had [*237] been proved upon a bill in the regular way by depositions.

The jury upon the trial of the issue could say no more, than that the sum of 440*l*. was due. No evidence was entered into as to what had been received. They proved the bond and the penalty; and that the condition was broken. Therefore that trial has nothing to do with the money now really due upon it from the assets of Norris, now about to be administered here; he being dead insolvent.

It was much litigated, whether, supposing a bill had been filed, (for I was clearly of opinion, that without consent it could not be determined in this summary way) More was entitled to file a bill to establish against the assets this demand. It depends upon the construction of the Annuity Act. The first section relates only to deeds, and instruments, that shall be executed after passing the Act,

for securing an annuity; and it requires a memorial of every such deed, or assurance to be enrolled within twenty days after execution, otherwise every such deed or assurance shall be void (a). It was admitted, that if the provision of the subsequent clause had been the same, the annuitant, however hard his case, could not have been heard either at Law or in Equity. But the next clause is of a very different nature; relating to persons already in possession of such securities, already executed; and directing, that in case the party shall neglect to comply with the act, not that the bond, the assurance, shall be null and void, but that any proceeding in an action brought before the registration shall be void. Consequently it leaves the bond in full force: so that the party, if he had commenced an action, and failed for want of such requisites being performed, might at any time have complied with it; for there is no limitation of time. The question then is, whether upon these two clauses taken together, where a man had a bond existing at the time the Act passed, upon which he had never commenced an action, and by an accident, or without any culpable neglect upon his part, and before he found it necessary, or thought it convenient to bring any action upon it, it has been lost, his remedy is totally taken away. It was insisted very strongly, that a very rigorous construction had been made upon this Act: so far, that though it passed in the middle of a session, and it is expressed to take place from and after the passing of the Act, yet, the Court of King's Bench having laid down (1), that [* 238] every act must *be presumed to pass from the first day of the session, till the late Act (2) cleared that difficulty, it was held, that the evidence of the actual time of execution must be rejected. But that is very different from this; for the Court did not enter into the question, how far according to conscience the party was entitled to relief; and it appeared to the Court of Law, as if the bond was given, after the act passed. Those cases therefore prove nothing.

It was contended in support of this claim, that an action and a bill in Equity are very different; and a case (3) was cited, in which it was determined, that a bill in Equity is not a sufficient claim, so as to avoid a fine. I do not mean to rest much upon that case and the determination of it, that to avoid the effect or prevent the operation of a fine at law a bill in Equity would not be sufficient. It certainly would not at law. But the true question is, what this clause meant: whether to impose upon those, who had bonds in their custody at

(a) See *Davidson v. Foley*, 3 Bro. C. C. (Am. ed. 1844), 598.

(1) *Latless v. Holmes*, 4 Term Rep. B. R. 660; *Hall v. Whalley*, 4 Term Rep. B. R. 662, n.

(2) Stat. 33 Geo. III. c. 13, enacting that the Clerk of the Parliament shall indorse on every Act, which shall pass after the 8th of April, 1793, the day, month, and year, when the same shall have passed, and shall have received the royal assent, and such indorsement shall be taken to be a part of such act, and to be the date of its commencement, where no other commencement shall be therein provided.

(3) *Glumdalclutch v. Leman*, 2 Black. 903.

the time the act passed, an obligation to perform requisites, with which it was impossible they could comply. This clause does nothing more than require certain things to be done, before an action can be commenced; which it is impossible for the party to do. It is no more than the law required upon an action on a specialty. At the common law no man could bring an action upon an instrument without *profert* till very lately (1). For a great while Courts of Law would not assist a man, who could not make *profert*. But there was no doubt, the debt was not extinguished; and though the party could not comply with the requisites to support an action, there was no doubt a bill in Equity would lie, calling upon the party either to admit the bond, or to give him an opportunity of proving the execution and the loss; and a Court of Equity always interfered. But the late Courts of Law have from the hardship waived that rule, and permitted a man to declare upon a lost bond (a). Lord Thurlow had a case (2) before him, in which it was contended, that therefore it was necessary to come *into [*239] Equity in such a case: but Lord Thurlow said, it was new to him, that there was such a mode of declaring at law without *profert* (and certainly many able lawyers have doubted the propriety of it); but he held, that it would not take away the jurisdiction, that has so long prevailed in Equity (b).

This clause in the Act of Parliament has no more effect than to take away the right to bring an action without performing the requisites imposed by the Act: and if it had been brought, proceedings would be staid. This annuitant could bring no action. Then considering it, as if a bill had been filed, he has done exactly what a party unable to make *profert* of a bond at law might have done. It appears to me, that if the case warrants such a bill in respect of the accident, by which the bond is not forthcoming, it is not affected by the Act; and the Legislature never intended to take away that remedy. Then, has his conduct been such as prevents him from availing himself of this remedy? It is said, he is guilty of culpable neglect. Was it necessary for him to bring an action? No great fruit could be expected from it; both parties becoming insolvent.

(1) *Read v. Brooknan*, 3 Term Rep. B. R. 151. See Mr. Fonblanque's observations on the consequences of the jurisdiction, which the Courts of Law have assumed in this instance, without the guard interposed by Courts of Equity to prevent abuse. 1 Fonbl. Tr. Eq. 16, and the Lord Chancellor's observations, *post*, *Ex parte Greenway*, vol. vi. 812; vii. 19; ix. 466; *East India Company v. Boddam*, *Seagrave v. Seagrave*, xiii. 439; xv. 338, 343; *Mossop v. Eadon*, xvi. 430; *Davies v. Dodd*, 4 Price, 176.

(a) 1 Chitty, Pl. (9th Am. ed.) 365, 366; *Cutts v. U. States*, 1 Gallis. 69; *Powers v. Ware*, 2 Pick. 451; *Smith v. Emery*, 7 Halst. 53; *Rees v. Overbaugh*, 6 Cowen, 748, 749; *Kelly v. Riggs*, 2 Root, 126; *Hinsdale v. Miles*, 5 Conn. 331.

(2) *Atkinson v. Leonard*, 3 Bro. C. C. 218.

(b) 1 Story, Eq. Jur. § 81-85; *Irving v. Planters' Bank*, 1 Humph. 145; *Shields v. Commonwealth*, 4 Rand, 541.

The Court in Massachusetts has no jurisdiction in cases of lost deeds, as an independent ground of Chancery jurisdiction. *Campbell v. Sheldon*, 13 Pick. 8. But the plaintiff may have a discovery in such case, as incidental to a question of trust. *Ib.* 20.

Then was it necessary for him to look after the bond, before he had occasion to bring an action? No: it was time enough for him to look after it then. He must suppose, it would be forthcoming, where he had placed it. He had no occasion, was under no necessity certainly, to bring an action. Perhaps no fruit could have been derived from it. He swears, when he had occasion to bring the action, he was surprised to find, that the bond was lost. The conclusion therefore is, that this annuitant under these circumstances, the debt not being annihilated by this clause of the Act, as in the other case, the restraint being only as to bringing an action, which only puts him in the situation he would have been in upon a lost bond, before the Courts of Law would have permitted a Plaintiff to declare without *profert*, has a right to be considered a creditor.

The difficulty I have is, how the debt is to be ascertained. No doubt, as soon as ever the first payment was withheld, the bond was forfeited; and at law the obligee might have recovered judgment for 440*l.*: but no execution could have issued upon that unquestionably, but only *toties quoties* for every 10*l.* The real debt in Equity is only these several sums of 10*l.* He goes on a considerable time. The material point is, what was due for *the annuity at the death of Norris; for I cannot go beyond that. The Master has found the whole debt due. He has received certain sums upon it.

The case of a stamp was also relied upon against this claim: supposing the instrument, a promissory note, was not to be found, and never had any stamp. A Court of Equity would not put the party, coming in aid of the law, in a better situation. If the Defendant says, he never gave any promissory note upon a stamp, the answer is, why then prove it? The instrument itself is absolutely void at law.

After some dispute, as to what should be considered the amount of the debt, it was compromised. It was declared upon the Exception, that More was entitled to be considered a creditor upon the estate of Norris; and by consent it was ordered, that he should be admitted a creditor for 222*l.*; and that he should pay the costs of the issue.

Costs were refused; the Court observing in answer to the application for More, that it would be no Equity to cure the defect at the expense of the estate of a party, who did not occasion it.

1. THOUGH the regular time for making a claim to bar the operation of a fine may have elapsed whilst a cause in Equity, touching the same subject has been pending, the non-claim will not prevent the Court from doing what good conscience demands; for Lord Hardwicke emphatically remarked, "it would trip up the jurisdiction of the Court of Chancery if, where the matter is proper for Equity, a bill were not to prevent the running of a fine; to suffer the fine to be a bar might in many cases be to suffer a party to steal away the estate." *Baker v. Prichard*, 2 Atk. 389. The same doctrine was still more firmly established by a reversal, (see 4 Brown's P. C. 92,) in the House of Lords, of a previous decree made by the Lords Commissioners in the case of *Pincke v. Thorneycroft*, the re-

port of which may be found in 1 Brown's Ch. Ca. 291. And it is now well settled, that a fine, constituting part of an assurance obtained by undue means, is no bar to relief in Equity. *Pickett v. Loggon*, 14 Ves. 234; *Hampson v. Hampson*, 3 Ves. & Bea. 42; *Parkes v. White*, 11 Ves. 230. Nor, when a fine is levied, pursuant to a decree, for a particular purpose, will a Court of Equity permit that fine to operate beyond such particular purpose. *Goodrick v. Brown*, 2 Freem. 180.

2. The grounds upon which Courts of Law now dispense with *proferet* have been questioned by Lord Eldon: *Ex parte Greenway*, 6 Ves. 813: his Lordship seems to have been of opinion, that in this, as well as in other respects, (*Cooth v. Jackson*, 6 Ves. 39,) proceedings in a Court of Law, upon a supposed analogy to proceedings in Courts of Equity, must not only be necessarily defective, but that the character of the law of this country has suffered more by this than by any other circumstance. See also, *ante*, as to this point, note 3 to *Brodie v. St. Paul*, 1 V. 326, and note 5 to *Lyster v. Dolland*, 1 V. 431. At all events it is quite clear the extension of the jurisdiction of Courts of Law to cases which, formerly, were subjects of equitable jurisdiction exclusively, has not ousted the jurisdiction of Courts of Equity. *Kemp v. Pryor*, 7 Ves. 249; *Bromley v. Holland*, 7 V. 20. That although the plaintiff, as to part of his demand, has a clear legal right, he may nevertheless sue for it in Equity when the question is mixed up with equitable circumstances, see the note to *Stevens v. Praed*, 2 V. 519: and that notwithstanding the invalidity of an impeached instrument might be tried at law, still it is discretionary in the Court of Chancery, after a bill filed, whether an action shall be permitted, see the note to *Newman v. Milner*, 2 V. 483; in order to prevent such litigation, it seems now established that it may be a proper exercise of the equitable jurisdiction to order impeached deeds to be delivered up. See note 1 to *Colman v. Sarrell*, 1 V. 50. Where an account is consequential upon the discovery obtained in a Court of Equity, it will be decreed *there*, although the discovery might enable the plaintiff to succeed at law: *Barker v. Dacie*, 6 Ves. 688: this, however, is discretionary; for instance, where the object of the suit in Equity has been to obtain an admission that a bond has been destroyed, in such case the equitable jurisdiction, as it is the most ancient, so it is still, in many cases, much the most convenient for doing justice, especially where there are several defendants, all liable to the same debt to the plaintiff, but having different equities as between each other; and when this is so, the Court of Equity will take the final arrangement and decision upon itself: *East India Company v. Boddam*, 9 Ves. 466: but whenever, after the requisite admission, that a lost bond once had existence, has been obtained in Equity, a question remains open with regard to the real tenor of the condition, and it appears that such question can be best investigated at law, now that *proferet* is no longer necessary, in such case Equity will retain the bill, giving liberty to the plaintiff to bring an action. *Seagrave v. Seagrave*, 13 Ves. 444.

3. In *Aylett v. Bennett*, 1 Anstr. 45, where the plaintiff had received a promissory note without a stamp, the Court of Exchequer directed a proper and valid note to be made by the defendant; but, it must be observed, the defendant, in the case cited, by his answer *admitted* the agreement upon which the note was founded.

ANDERSON, *Ex parte*.

[ROLLS.—1800, FEB. 13, 17.]

AN infant trustee ordered to convey an estate in Calcutta under the stat. 7 Anne, c. 19.

Order upon petition under the stat. 7 Anne, c. 19, for an infant trustee to convey to the persons, absolutely entitled, or as they shall appoint; but not to convey to a new trustee, upon trusts to be executed, without a bill, [p. 241.]

AN order was made on petition, referring it to the Master to examine, how the estate mentioned in the petition was vested in Richard Sumner; and whether he was an infant and a mortgagee or trustee within the intent and meaning of the act of Queen Anne (1).

The Master by his report, dated the 28th of November, 1799, stated, that a state of facts had been laid before him, verified by affidavits; whereby it appeared, that by indentures of lease and release, dated the 15th and 16th of September, 1777, reciting, that Samuel Touch and Herbert Harris for the benefit of themselves and their partner Joseph Hodson on the 16th of December last [*241] had *borrowed from several persons (therein named) the several sums of money (specified) upon their several bonds; and that it was agreed, that they should release and convey the plantation and lands after-mentioned as a farther security; and that the making a separate mortgage to each obligee would be attended with great expense; and therefore it had been agreed that the said plantation should be granted and conveyed to Richard Sumner and Charles Newman, in trust for the said obligees according to the amount of their said several debts; it was witnessed, that in consideration of the said several sums the said Samuel Touch, &c. did grant, bargain, sell, alien, remise, and release, to Sumner and Newman, their heirs, executors and administrators, the plantation and premises in Bengal held under a Pattah or grant from the East India Company, and all the buildings and appurtenances, to hold to them, their heirs, executors, administrators, and assigns, for ever, upon trust, nevertheless for the sole use and benefit of the said obligees; with a proviso for redemption.

The mortgage became forfeited; the sums not being paid. In 1782 Newman was lost in the Grosvenor East India ship. In July 1798 Sumner died; leaving an infant son under the age of three years.

The Master stated, that upon inquiry at the India House he could not ascertain, whether the said Pattah or grant was of the nature of a real estate or a chattel interest; the circumstance however of the mortgage being by lease and release had inclined him to presume, that the said Pattah or grant was a conveyance of real estate; and therefore he was of opinion, that under all the circumstances it would be proper for the infant to join with the personal representative of

Richard Sumner, the father, in the conveyance of the mortgaged premises to a new trustee, as prayed by the petition.

A petition was presented by all the surviving creditors and the representatives of those deceased; praying, that the report may be confirmed: and that the infant may be directed to convey unto one or more trustee or trustees, to be appointed by the petitioners, upon the trusts of the said indentures of release of the 16th of September, 1777.

Mr. *Martin*, in support of the petition: Mr. *Fonblanque*, contra.

* The MASTER OF THE ROLLS having some doubts as to [* 242] the jurisdiction, the petition stood over.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have been furnished by Mr. Dickens with two or three cases, in which an infant trustee of estates in the colonies has been ordered to convey under the statute of Queen Anne. Lord Thurlow doubted upon it; as I do. The act is general; and does not confine it. Therefore, and upon the authority of prior cases, his Lordship did make the order: though it seems very extraordinary, that I should order an infant in Calcutta to convey: by what conveyance? (a)

The cases, with which I have been furnished, are *Ex parte Bosanquet* (1); in which the infant was ordered to convey: *Ex parte Fenniliteau* (2); in which the report upon the reference directed by Sir Thomas Sewell was confirmed by Lord Thurlow; and *Ex parte Osborn* (3); in which upon a similar application, that an infant might convey an estate in Barbadoes, Lord Thurlow entertained doubts, probably not recollecting the former cases, and sent for the Act; and upon the authority of the former cases, and finding the Act general, he ordered the infant to convey (4).

Another difficulty I have is, to whom the conveyance is to be made. There never yet was an instance of desiring the Court to appoint a trustee, that an infant trustee might convey to him upon trusts to be executed; and is not this doing the same thing?

For the Petition. As to the objection to the jurisdiction the Statute of Frauds (5) has been determined to apply to Calcutta. With respect to the mode of conveyance, the petition states, that this conveyance was by lease and release.

With respect to the last objection, the prayer of the petition is only, that the infant shall convey, as the creditors shall appoint.

(a) 2 Macpherson on Infants, ch. 34, (Lond. ed. 1842,) 435, *et seq.*; note (b) to *Ex parte Prosser*, 2 Bro. C. C. (Am. ed. 1844,) 325.

The law in reference to conveyances by infant trustees, now depends upon the 1 Will. IV. c. 60, concerning which see 2 Macpherson on Infants, ch. 34, (Lond. ed. 1842,) 436; 1 Sugd. Vend. & Purch. (6th Am. ed.) 233, [321.]

(1) Before Lord Bathurst, the 10th of November, 1777; 2 Dick. 540.

(2) Before Sir Thomas Sewell, the 28th of May, 1781; and before Lord Thurlow, the 27th of November, 1781; 2 Dick. 569.

(3) Before Lord Thurlow, the 10th of May, 1785.

(4) See also *Ex parte Prosser*, 2 Bro. C. C. 325; *Evelyn v. Forster*, *post*, vol. viii. 96; see *Att. Gen. v. Pomfret*, 2 Cox, 221.

(5) 29 Char. II. c. 3.

The object of the Legislature was to remove the inconvenience, where the legal estate had got to an infant. This conveyance for the benefit of creditors has by the surviving trustee got to [* 243] * this infant; and it is impossible to do any thing without getting it out of him.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. It is never done, except where the party has the absolute right. An infant trustee is never ordered to convey to another trustee upon trusts to be executed (1). That must be by a bill; praying to have a new trustee appointed, and a conveyance. You never can do it upon an *ex parte* petition (a). Are all these petitioners the persons absolutely entitled to the money? If so, the order must be to convey to them, or as they shall appoint. They must all join.

The question from the Court being answered in the affirmative, the order was, that the infant shall join with the personal representative of the surviving trustee in conveying this estate to the petitioners (naming them) or as they shall appoint (2) (b).

SEE, *ante*, note 2 to *Ex parte Sergison*, 4 V. 147.

SIMS v. DOUGHTY.

[ROLLS.—1799, JULY 24; 1800, FEB. 18.]

THE rule of construction of wills is, that, if the general intention can be collected, or any one particular object, (c) expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake: not otherwise; and, if two parts of the will are totally irreconcilable, the latter overrules the former. (d)

Retainer allowed to one executor out of a legacy to his co-executor in respect of a *devastavit*, [p. 243.]

PERIGRINE SIMS made a very incorrect will, with several alterations and interlineations. The passages in the following delineation

(1) *Ex parte Chasteney*, 1 Jac. 56.

(a) Where an infant heir is declared by the decree of the Court to be a trustee for a purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary. See *Miller v. Knight*, 1 Keen, 129, and cases there collected. See also upon the mode of proceeding, *Baynes v. Baynes*, 9 Ves. jr. 462; 2 Macpherson on Infants, (Lond. ed. 1842,) p. 437, 438, ch. 34; *Evelyn v. Forster*, 8 Ves. jr. 196.

(2) See 1 Fonb. Treat. Eq. 83.

(b) See *Livingston v. Livingston*, 2 Johns. Ch. 541.

(c) Where there is a general intent and a particular one, the particular is to be sacrificed to the general intent. See 2 Williams, Executors, (2d. Am. ed.) 789, 790; *Jesson v. Wright*, 2 Bligh, 49; *Doc v. Harvey*, 4 Barn. & Cress. 620.

(d) See 2 Williams, Executors, (2d. Am. ed.) 794; *Sherrill v. Bentley*, 2 Mylne & Keen, 149. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. *Covenhoven v. Shuler*, 2 Paige, 122; *Adie v. Cornwall*, 3 Monro, 279.

But this rule is only applied to those cases, where the two provisions are totally

of it inclosed in a parenthesis were interlined, and those between brackets were drawn through with a pen, in the original will. The observations in the margin also stand, as they appear in the original.

The testator gave to each of his daughters Mary and Elizabeth Sims one [thousand] (hundred) pounds 3 per cent. Consolidated Bank Annuities for their own use and benefit. Then reciting, that his brother was bound to invest 1000*l.* 3 per cent. Consolidated Bank Annuities at three months after his decease, he directed, that the same should be for the equal benefit of his said daughters Mary and Elizabeth Sims, and should be transferred and paid to them accordingly, with all the interest and dividends due thereon. Then *reciting a debt of 600*l.* from the testator's niece [* 244] Elizabeth Sims, he gave his said daughters Mary and Elizabeth Sims the interest, that should accrue and become payable from time to time after his decease upon the said 600*l.* The will then proceeded thus :

“ And whereas my son-in-law James Renat Sims is indebted to me in three hundred pounds upon his bond and in the further sum of three hundred pounds on the security of the lease of his own dwelling-house in Pudding-Lane, London, (which sums making together [six hundred pounds] I give equally to my daughters Mary and Elizabeth) and in two hundred pounds upon his note or notes of hand making together eight hundred pounds [now I do hereby release and discharge the said James Renat Sims of and from the three hundred pounds secured by the lease of his house as aforesaid, and do order and direct that he may not be called upon by my executors for payment of the (eight) remaining five] hundred pounds before the expiration of three years next after my decease, unless he should choose to pay the same before, so that the interest thereof in the mean time be regularly paid ; and it is my will, that the interest of the said [five] (eight) hundred pounds shall be paid by my executors as the same is received unto my said daughters Mary and Elizabeth [and son Edward] Sims and that the said principal sum of [five]

Of no force
Per Sims.
Stands good
Per Sims.
Interest on
my son J. R.
Sims' debt to
be paid my
daughter.

inconsistent with each other, and where the real intention of the testator cannot be ascertained. *Covenhoven v. Shuler*, 2 Paige, 122.

It must not, however, be understood, that, because the testator uses, in one part of his Will words having a clear meaning in law, and in another part words inconsistent with the former, that the first words are to be cancelled or overthrown. *Jeason v. Wright*, 2 Bligh, 56. The contrary principle is fully established in the doctrine that the general intent shall overrule the particular. 2 Williams, Executors, *ubi supra*. The words of a Will are not to be rejected, unless there cannot be any natural construction of them as they stand. 1*b.* But if there are words which have no intelligible meaning, or be absurd, or repugnant to the clear intent of the rest of the Will, they may be rejected. *Bartlett v. King*, 12 Mass. 537; *Needham v. Ide*, 5 Pick. 510.

Where the meaning of a testator is incorrectly expressed, the Court will carry it into effect by supplying the proper words. *Covenhoven v. Shuler*, 2 Paige, 122; *Deakins v. Hollis*, 7 Gill & Johns. 311.

(eight) when paid off and discharged shall be for the benefit of my daughters Mary and Elizabeth and son Edward Sims. And I do hereby give and bequeath the same accordingly between them."

In the last part of this clause the names appeared to be written upon an erasure.

The testator then gave his real estate to his son Edward Sims and his heirs and his assigns : and he gave to his said daughters a leasehold messuage, to hold to them equally, while unmarried, and in case of the marriage of either to go to the other, and in case of the marriage of both to go to his son Edward Sims (unless it should be their desire to sell it, and then to be equally divided). He [*245] directed, that *all his goods, linen, and household furniture, in the messuage in Church Row Fenchurch Street, wherein he resided, except his plate, shall be continued and kept for the use of his said son Edward and daughters Mary and Elizabeth, while they live together and continue single ; and if any or either of them should marry, the property of the said goods and effects shall belong to the others or other of them, that shall last remain single and unmarried, for his or her own use and benefit, and he gave and bequeathed his plate to his son (said) Edward and daughters Mary and Elizabeth equally between them.

The testator among other legacies gave and bequeathed unto Peregrine Sims the sum of 300*l.* in manner hereinafter mentioned ; that is to say, he desired, that the said 300*l.* may be laid out and invested upon and in the name of his son Edward Sims in 3 per cent. Consolidated Bank Annuities, or any other fund, that his executors may think proper or otherwise dispose of to the best advantage, in trust to pay and apply the interest and dividends thereof for the maintenance and education of Peregrine Sims during his minority, and to transfer and pay the principal and the securities to him at twenty-one ; but in case of his decease under age then the testator gave the said 300*l.* unto Edward Sims.

The rest of the will, in which also appeared alterations and interlineations, contained nothing material. All the legacies were inserted in figures in the margin ; and at the bottom of each sheet it was noticed, that the alterations were made by the testator. Edward Sims, the testator's son, was made residuary legatee ; and he, Blizard and Doughty, were appointed executors. Edward Sims died insolvent ; and his sisters took out administration to him. Blizard never acted. One sum of 300*l.* due to the testator by James Renat Sims had been recovered in an action, brought in the names of all the executors, with 144*l.* 15*s.* interest ; and upon the 20th of February, 1795, Doughty paid Mary Sims 100*l.* as her third, and to Elizabeth Sims the like sum, as her third, and the like sum to Edward Sims, as his third. Doughty also divided and paid the sum of [*246] 144*l.* 15*s.* equally between Mary and *Elizabeth Sims ; and they agreed to accept 450*l.*, payable by instalments, in satisfaction of what remained due from James Renat Sims ; and

that sum was accordingly received by Doughty. All the other legacies except that to Peregrine Sims were discharged.

The bill was filed by Mary Sims and Elizabeth James, late Sims, with her husband; the Plaintiffs claiming the capital of the money received by the Defendant on account of the debt due from James Renat Sims, equally between them.

The Defendant by his answer stated, that he believed Edward Sims in his life received sufficient to answer the legacy to Peregrine Sims; and invested 321*l.* 2*s.* 6*d.* in the sum of 350*l.* 3 per cent. Consolidated Bank Annuities; which he afterwards sold and applied to his own use. He submitted, that one third of the sum of 450*l.* received by him in satisfaction of the remainder of the debt from James Renat Sims, ought to be taken as the personal estate of Edward Sims, and should be retained by the Defendant in satisfaction of the legacy to Peregrine Sims; and under the circumstances, and especially as it appears by the bill, that the 100*l.* paid by the Defendant to Edward Sims, as his share of the 300*l.* received from James Renat Sims for the principal upon his hand, was afterwards paid by Edward Sims to the Plaintiffs, the farther sum of 100*l.* should be retained by the Defendant out of the said 450*l.* in lieu of the 100*l.* so paid by the Defendant to Edward Sims, in farther satisfaction of the legacy due to Peregrine Sims.

In answer to charges in the bill the Defendant stated, that he does not recollect, that, when he paid the 100*l.* to Edward Sims, he said, it did not belong to him, or that, whatever the will might be, he knew, it was his father's intention to give the 600*l.* to his sisters; and he would not take it from them, &c. The Defendant admitted, that Edward Sims paid the said 100*l.* to the Plaintiffs.

The cause had stood some time for judgment. It was argued by Mr. Richards for the Plaintiffs, and Mr. Cox for the Defendant.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The will, upon which this suit arises, is almost incomprehensible, and perfectly inconsistent with itself. The question is only, which of the testator's meanings it is my * duty to adopt. [* 247] The rule with regard to cases of this sort is, if upon a general view of the will I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it, if I plainly see, those expressions are inserted by mistake, I may reject them. But I cannot reject any words, unless it is perfectly clear, they were inserted by mistake; and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention. The Court is in a dilemma; and cannot act at all, unless they do that (1).

(1) In *Constantine v. Constantine*, *post*, vol. vi. 100, the Master of the Rolls repeats this rule; but in neither instance mentions, whence it is derived. It certainly is not satisfactory. There is no analogy to the rule, that of two inconsistent instruments the first deed, and the last will, shall prevail. Every part of an instrument is contemporaneous by the execution, or delivery: which gives authen-

In this will are two things perfectly inconsistent: first, the testator gives 600*l.*, part of a sum of 800*l.* absolutely to his daughters Mary and Elizabeth; and afterwards he gives the interest of the 600*l.* to his said two daughters, and, according to the construction of their Counsel, the principal likewise: but unfortunately the words "son Edward Sims" have crept in. It was contended, that was by mistake. I cannot say that; no more than that the other words, expressing an absolute interest in the daughters, were inserted by mistake.

Therefore declare, that the Plaintiffs are entitled to the interest of the 800*l.*, due from James Renat Sims, for three years from the testator's death; and that at the expiration of that period the principal became divisible among the Plaintiffs and the testator's son Edward Sims or his personal representatives.

This decree, which was pronounced immediately before the commencement of the long vacation, and in the absence of the Counsel, being defective in not meeting the whole case, an application was made on the part of the Defendant; in consequence of which the following decree was made.

It was declared, that according to the true construction of the will the Plaintiffs are entitled to the interest accrued upon
 [* 248] *the sum of 300*l.*, due to the testator from James Renat Sims, down to the payment of the said 300*l.* to the Defendant; and that the Defendant shall pay the sum of 150*l.*, the money received by him for interest upon the said 300*l.* to the Plaintiffs. An account was directed of interest upon the money received by the Defendant from James Renat Sims on account of the money due to the testator; and the Master was directed to distinguish the interest payable by the Defendant on account of the 300*l.* from the interest payable by him on account of the said 150*l.* the interest of the said principal sum; and it was ordered, that the Defendant shall pay what shall be due for such last-mentioned interest to the Plaintiffs; and, by consent, that the Defendant retain his costs, and pay the Plaintiffs their costs; and it was declared, that, after deducting what shall be due for such interest and costs, the residue of the money remaining in the hands of the Defendant, with the interest before directed to be computed, is divisible in the following manner: one third to the Plaintiff Mary Sims: one third to the Plaintiffs William and Elizabeth James in the right of the latter; and the remaining third to the said Plaintiffs as administratrixes of Edward Sims deceased; and it was ordered, that the

ticity and effect to each clause at once; and no one has priority: *post*, vol. xix. 647. Of two inconsistent clauses in one instrument therefore it seems more consistent to adopt that, which best corresponds with the general intention; or, if that affords no light, as where a specific article is bequeathed to different persons in the same will, to consider the bequest void for uncertainty.

As to the construction of wills, see *Mellish v. Mellish*, and *Philipps v. Chamberlaine*, *ante*, vol. iv. 45, 51: *post*, *Wilde v. Holtzmeier*, 811; *Careless v. Careless*, *Chambers v. Brailsford*, xviii. 368; xix. 601, 652; 1 Mer. 384; 2 Mer. 25.

Defendants shall pay two thirds to the Plaintiffs respectively: but it was declared, that the share of Edward Sims ought to be retained by the Defendant to answer, so far as the same will extend, the legacy of 300*l.* to Peregrine Sims, received by Edward Sims, and converted to his own use.

1. For some of the leading rules with respect to the construction of testamentary instruments, see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194: and that the attempt to combine the general intent of a testator with his particular intent has, in many cases, gone far to destroy both, see note 6 to *Bristol v. Warde*, 2 V. 336.

2. The rule laid down by Lord Alvanley in the principal case, that if two parts of a will are totally irreconcilable, the latter must be understood as the expression of the testator's final intention on the subject, was again adhered to by his Lordship in *Constantine v. Constantine*, 6 Ves. 102: and Sir Thomas Plumer held the rule to be unquestionable, where its application was not excluded by circumstances rendering the hypothesis of a variation of intent inadmissible. *Galland v. Leonard*, 1 Swanst. 163. But it should seem that the rule is, at best, but a last resource, and only to be resorted to in order to escape total inconsistency, for Lord Eldon has observed, a Court is bound to say a testamentary writing is no will at all until it is executed, and that the testator, at the time of its execution, contemplated every part as having effect at one and the same time. *Langham v. Sandford*, 2 Meriv. 11, 22.

MOSLEY v. MOSLEY.

[ROLLS.—1800, FEB. 18.]

An instrument is to be construed without adverting to the nature of its provisions, if legal; or to what they would have been, if a particular case had been contemplated.

Under a power for raising portions for younger children an appointment by a charge, confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment, [p. 249.]

Arrangement of charges as to priority. A power, when executed, takes place according to the original deed creating it, [p. 249.]

Charges upon an estate, more than sufficient to answer them, directed to be raised by mortgages of different parts, [p. 249.]

By indentures of lease and release, dated the 30th and 31st of May, 1782, Sir John Parker Mosley and his son Oswald Mosley under power given them by the will of Sir Oswald Mosley appointed and conveyed the manor of Manchester and several other estates in the counties of Lancashire and Stafford to trustees, their heirs, &c. upon trust as to the Staffordshire estates, except the rectory *and advowson of Rolleston and premises in Tutbury, [*249] subject to an annuity of 400*l.* to Oswald Mosley, to the use of Sir John Parker Mosley for life, if Oswald Mosley should so long continue unmarried; remainder to trustees to preserve contingent remainders: but if Oswald Mosley should marry in the life of his father, then to Oswald Mosley for life; remainder to trustees to preserve contingent remainders; and after his decease, in case he should marry in the life of his father, and his father should survive

him, to trustees to preserve contingent remainders; and, as to the rectory of Rolleston and the other particulars excepted, to Sir John Parker Mosley for life; remainder to trustees to preserve contingent remainders; and as to the Lancashire estates, except premises limited in jointure, to trustees for 500 years; and, subject thereto and to the proviso after mentioned, to the use of Sir John Parker Mosley for life; remainder to trustees to preserve contingent remainders; and after his decease, as to the premises appointed to Dame Elizabeth Mosley for life, for her jointure, to the use of said Dame Elizabeth for life; and as to those premises after the decease of the survivor of them, and as to all the other Lancashire estates after the decease of Sir John Parker Mosley, subject to the term of 500 years, and likewise the rectory and advowson of Rolleston and premises in Tutbury after his decease, to trustees for 1000 years; and as to all both Lancashire and Staffordshire estates, subject to the said uses, to Oswald Mosley for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male: with similar limitations in strict settlement to John Péploe Mosley, the second son of Sir John Parker Mosley, for life, and to his first and other sons, and to Nicholas Ashton Mosley, the third son, and his sons successively; remainder to all and every other sons of Sir John Parker Mosley in tail general; remainder to trustees for 2000 years; remainder to Oswald Mosley in fee.

The trust of the term of 500 years was declared to be to raise by sale or mortgage 12,000*l.*, and to pay the same to Sir John Parker Mosley or to such person as he should appoint.

The trust of the term of 1000 years was after the death of Sir John Parker Mosley, or in his life, if he should so direct, by sale or mortgage to raise portions for all and every his child or children by his said wife (except an eldest son) not exceeding 4000*l.* for any one child, and not exceeding 18,000*l.* in the whole; and a provision was made for maintenance.

[* 250] * The trust of the term of 2000 years was, in case none of the sons of Sir John Parker Mosley should have issue male, or if such issue should die under twenty-one, to raise portions for the daughters of Sir John Parker Mosley, not exceeding 30,000*l.*

The settlement contained a power to Oswald Mosley by deed or will either before or after marriage, (but without prejudice to the life estate of Sir John Parker Mosley in the rectory and advowson of Rolleston and premises in Tutbury,) to appoint all or any part of the said manor, rectory and premises, in Staffordshire, not exceeding 1000*l.* per annum, upon any woman he might marry, for a jointure. Another power was given to him to charge the Staffordshire estate with 20,000*l.* for the portions of his younger children; and also to charge all or any part of the same premises (but subject and without prejudice to the life estate of Sir John Parker Mosley in the rectory and advowson of Rolleston and premises in Tutbury, as aforesaid) with any yearly sum or sums of money for the mainten-

ance and education of such children or child (except an eldest or only son), not exceeding the interest of such portions, at 5 per cent. per annum; such portions and maintenance to be raised by such ways and means, and to be paid at such times, and in such manner, as Oswald Mosley should appoint by the same or any other deeds or deed, or his will as aforesaid. Another power was given to Oswald Mosley after the decease of Sir John Parker Mosley, but subject to the said terms of 500 and 1000 years, to charge all the said estates with 12,000*l.* by mortgage, with interest, for any purpose; covenanting to keep down the interest for his life. Another power was given to Oswald Mosley and the several other tenants for life, when in possession, to jointure upon the Lancashire estates, to charge portions for younger children, not exceeding 15,000*l.* and to lease. The deed also contained a power of revocation to Sir John Parker Mosley and Oswald Mosley, and to the former, surviving.

By indentures of lease and release, dated the 22d and 23d of May, 1783, reciting the settlement of 1782, and the power to Oswald Mosley to charge the Staffordshire estates with 20,000*l.* for the portion or portions of all or any of the children or child, which he might have (except an eldest or only son), and the powers of leasing and revocation; and that the 20,000*l.* provided for the younger children of Oswald Mosley, would be too * heavy [* 251] a charge upon the Staffordshire estate; and in case he should make a jointure to the full amount of 1000*l.*, the 20,000*l.* could not be raised during the life of his wife; it was therefore agreed, that the said sum should also be a charge upon the Lancashire estates, without prejudice to the life estate of Dame Elizabeth Mosley; and farther reciting, that the power of leasing was not sufficiently extensive and that the trustees resided at an inconvenient distance, Sir John Parker Mosley and Oswald Mosley revoked the uses, subject to such mortgages, leases, &c. as had been made, and to the jointure of Dame Elizabeth Mosley; and the estates were conveyed to new trustees and their heirs to the same uses, except as aforesaid, and also subject to the powers and proviso after mentioned; with a power or proviso, that it might be lawful for Oswald Mosley by deed or will, subject to the life-estate of Sir John Parker Mosley and Dame Elizabeth Mosley's jointure, to charge the Lancashire estate with any sum, not exceeding 20,000*l.*, for or in part of the said sum of 20,000*l.* made chargeable by said recited indenture of release upon the Staffordshire estate for the portion or portions of all or any of the children or child of Oswald Mosley (except an eldest or only son), and to charge all or any of the premises in Lancashire (but subject as aforesaid) with any yearly sum or sums for maintenance and education of such children (save an eldest or only son) not exceeding the interest at 5 per cent.; to be raised and paid at such time (after the death of Sir John Parker Mosley) and in such manner as Oswald Mosley should direct by the same or any other deed or will.

It was declared, that no part of the said 20,000*l.* should be paid,

or the interest thereof commence, until after the decease of Sir John Parker Mosley; with a proviso, that nothing contained in the said indenture should prejudice or affect the power given to Oswald Mosley by the said indenture of charging the Staffordshire estates with the sum of 20,000*l.* or any part thereof, or with the interest thereof, as he should think proper, provided, that the sum or sums so to be charged upon both estates should not together exceed 20,000*l.*; nor prejudice the power of Oswald Mosley to charge, when in possession of the Lancashire estate, 15,000*l.* upon the same premises. Farther powers of leasing and of revocation were also given.

[* 252] * By indentures of lease and release, dated the 30th and 31st of January, 1784, previous to the marriage of Oswald Mosley with Elizabeth Tonman, revoking the uses of the indentures of 1782 and 1783 as to the Staffordshire estate (except the rectory and advowson of Rolleston and premises of Tutbury,) Sir John Parker Mosley and Oswald Mosley conveyed the Staffordshire estate, except the said premises before excepted, to the use of Oswald Mosley for life; remainder to trustees to preserve contingent remainders; remainder to Elizabeth Tonman for life in lieu of dower; remainder to trustees to preserve contingent remainders; remainder to the use of their first and other sons in tail male; remainder to the first and other sons of Oswald Mosley by any other wife in tail male; remainder to Sir John Parker Mosley for life; remainder to trustees to preserve contingent remainders; with remainders to his second and third sons for life, and to their sons respectively and successively in tail male, and to all the other sons of Sir John Parker Mosley; and to the right heirs of Oswald Mosley for ever.

It was farther witnessed, that for the consideration therein after mentioned, and for making a provision for the issue of the said marriage, in case there should be four or more children of the said marriage other than an eldest or only son, in manner after mentioned, Oswald Mosley by virtue and in pursuance of the power given and vested in him by the said indenture of release, dated the 23d of December, 1783, and of all other powers enabling him thereto, did charge all and singular the manor of Manchester and the said estates in the county of Lancaster with the payment of the sum of 10,000*l.*, in case the said marriage should take effect and there should be four or more children of the said marriage but not otherwise other than and besides an eldest or only son; the same sum of 10,000*l.* to be paid and payable to such four or more children except an eldest or only son at the times and in the manner after mentioned, subject to the life estate of Sir John Parker Mosley in the premises; and also subject to the life estate of Dame Elizabeth Mosley in such of the premises as were limited to her for life; and it was farther witnessed, that in farther pursuance and performance of the said proposal and agreement, and for more effectually making a provision for the issue of the said intended marriage in case there should be four or more children of the said marriage other than

and besides an eldest or only son, Oswald Mosley by virtue and in pursuance of the power vested in him by the said several indentures of release and of all other powers enabling him thereto, did grant and release unto the said trustees the manor of Manchester and the estates in the county of Lancaster, to hold the same for 3000 years, without prejudice to the life estates of Sir John Parker Mosley and Dame Elizabeth Mosley upon the trusts after mentioned: that is to say, in case there should happen to be four or more children of the said Oswald Mosley and Elizabeth Tonman other than an eldest or only son, in trust, that the trustees should after the decease of Oswald Mosley, or in his life-time, if he should so direct by any deed or deeds, writing or writings, to be executed and attested as therein mentioned, by mortgage of the premises comprised in the said term or by the rents and profits thereof raise any sum or sums of money for the portion or portions of all and every or any of such four or more children of the said Oswald Mosley and Elizabeth Tonman other than and except an eldest or only son, not exceeding in the whole 10,000*l.* before charged by the said Oswald Mosley upon the said lordship or manor of Manchester, and a maintenance for such or any such four or more children excepting an eldest or only son not exceeding the interest for such portion or portions after the rate of 5 per cent. per annum; and in case the said Oswald Mosley shall depart this life without directing or appointing portions to be raised for such of his four or more children by the said Elizabeth his intended wife except an eldest or only son to the amount of 10,000*l.* in the manner herein before mentioned, then in trust, that the trustees or the survivor of them or the executors or administrators of such survivor shall after the decease of Oswald Mosley by all or any of the ways and means aforesaid levy and raise the sum of 10,000*l.* or such other sum as together with such sum and sums as the said Oswald Mosley should have directed or appointed to be raised for such portion or portions, as aforesaid, will make up or amount to the said sum of 10,000*l.* for the portions of all and every the children of them the said Oswald Mosley and Elizabeth Tonman other than and except an eldest or only son and also except such child and children, for whom a portion or portions should be by the said Oswald Mosley directed to be raised, as aforesaid; the same to be paid to such child or to be shared and divided between such children except as aforesaid in equal parts

* and proportions share and share alike; to such child or [* 254] children being a younger son or sons at twenty-one, or some part not exceeding a fourth to be advanced after the death of Oswald Mosley for advancement of such son or sons; and to such of the said children as should be a daughter or daughters at twenty-one or marriage: provided the times of payment should happen after the decease of Oswald Mosley; but if any of the son or sons should attain twenty-one or daughter or daughters should marry in the life of Oswald Mosley, then the portion and share or portions and shares of such daughter or daughters so attaining twenty-one or being

married and of such younger son and sons so attaining twenty-one should be paid within six months after the decease of Oswald Mosley with interest at 5 per cent. from his death ; and notwithstanding the postponement of the payment thereof until after his death to be considered as a vested interest in those attaining twenty-one or daughters being married in his life. It was farther declared, that if any of such child or children should die under twenty-one, their issue should represent their deceased parent ; and a power was given for raising sums for maintenance and education not exceeding the equivalent interest of the respective portions of each child.

By another deed a considerable fortune belonging to Elizabeth Tonman was settled upon the children of the marriage.

There were only four children of the marriage: Oswald, John, Elizabeth, and Frances.

Oswald Mosley, the father, by his will dated the 10th of March, 1789, after devising real estates, that had been purchased by him, and disposing of his personal estate, reciting his power to charge the Lancashire estate with the sum of 20,000*l.*, and that by his marriage settlement he had executed that power in part by charging 10,000*l.*, part thereof, in favor of his younger children, in case he should leave four or more such younger children by his said wife, did thereby farther charge his said estates in the said county of Lancaster with the remaining sum of 10,000*l.* ; which he thereby gave and bequeathed to and equally to be divided among his younger children then already born or hereafter to be born, share and share alike,

exclusive of and in addition to the said other sum of [*255] 10,000*l.* settled in their favor in the event aforesaid ; * the same to be paid to such of them as should be a son or sons at the age of twenty-one, and to such of them as should be a daughter or daughters at twenty-one or marriage, which should first happen after the same could be raised by virtue of the said power.

The testator then devised and appointed the said hereditaments in the county of Lancaster to the said trustees for 3000 years, to be computed from the time of his decease, upon trust by such ways and means as they or the survivor, his executors, &c. should think proper, to raise the said sum of 10,000*l.* thereby charged thereon, with lawful interest for the same from the day of the death of Sir John Parker Mosley, until such children respectively should receive their respective portions of the same sum of 10,000*l.* ; and he directed the trustees to pay and apply all or such part of the interest of the said sum of 10,000*l.*, thereby charged as aforesaid, as they should think proper, for and towards the maintenance and education of his said younger children ; and he appointed his father and other persons his executors, and his wife, his father, and his brother Ashton Nicholas Mosley, guardians of his children, whether then born or hereafter to be born, till they should respectively attain the age of twenty-one years, if his wife should so long live, and continue his widow : but if she should die, or marry again, before all their

children should attain their ages of twenty-one years, then he appointed his father, brother, and two of his executors, and the survivor of them, guardians of such of his children as should be under twenty-one at the decease or second marriage of his wife, until they should respectively attain that age.

The testator died in August, 1789; leaving Oswald Mosley, his eldest son, and the other three children, surviving him. His widow died in October, 1789.

Sir John Parker Mosley, by his will, dated the 17th of November, 1789, reciting the settlement of May, 1782, his power thereby to charge 100*l.* a year in augmentation of his wife's jointure, the trust term of 500 years to raise 12,000*l.* for his own benefit, or as he should appoint, and the trust to raise 18,000*l.* for the portion or portions of his younger child or children, in pursuance of the said powers charged 100*l.* a year for his wife for her life; and *appointed, that so much of the 12,000*l.* as should not be [*256] raised at his death, and as should be necessary, should be immediately raised and paid to his executors, for paying his debts, funeral expenses, legacies, and annuities. He also directed, that the 18,000*l.* should be raised as soon as might be after his decease, and that the same should be paid and divided unto his younger children, sons and daughters, in such manner as therein mentioned, at twenty-one or marriage; with directions for the application of the interest till payment for maintenance and education; with benefit of survivorship.

By a codicil the testator declared, that two sums, agreed to be settled upon the marriages of a son and a daughter, were part of the said 18,000*l.* By another codicil he provided, that any advances made or to be made by him for his children should be deemed part of the said 18,000*l.*, if so expressed.

The testator Sir John Parker Mosley, having survived his wife, died upon the 29th of September, 1798.

The bill was filed by the three younger children of Oswald Mosley against his eldest son Sir Oswald Mosley and several other parties; praying, that the Plaintiffs may be decreed entitled to the whole sum of 20,000*l.*; and that the same may be declared a prior charge or incumbrance to the said two sums of 12,000*l.* and 18,000*l.*, directed to be raised by the will of Sir John Parker Mosley under the term of 500 years and 1000 years. The bill prayed the usual directions for maintenance, a receiver, &c.

The reason assigned by the answers for insisting, that the portion, to which the Plaintiffs were entitled, was not to be considered as a prior incumbrance, was, that the terms of 500 years and 1000 years, under which the charges of 12,000*l.* and 18,000*l.* were to be raised, were respectively created by a deed executed long prior to the charge of 20,000*l.*

The questions were, first, to what sum the Plaintiffs were entitled under the charge of 20,000*l.*

Secondly, as to the priority.

*The Master of the Rolls expressed a strong opinion against the Plaintiffs upon the first point, and in their favor on the second.

Mr. *Graham* and Mr. *Stanley*, for the Plaintiffs. The Plaintiffs are entitled to both these sums of 10,000*l.* The first provision is a trust for a special appointment; and that is applied to the specific case of four or more younger children; therefore, if it stopped there, the Plaintiffs could claim no benefit. But it goes on; and the next provision applies to the case actually existing at the decease of Oswald Mosley; and is a trust for the benefit of all or any children, that there might be. It will be said, there was an appointment: but the farther trust is to arise, in default of such an appointment applying to that specific case. The will plainly marks, that the testator thought he had effectually appointed the first 10,000*l.* in favor of his children; contemplating the power; and stating, that he had executed that power in part by charging 10,000*l.* in favor of his younger children, in case he should leave four or more, and then charging the remaining sum of 10,000*l.* The question therefore is, upon the instrument of 1784, executing the power. That provision does seem industriously adapted to a particular case; which does not exist: but fortunately the subsequent part provides for the very probable case of fewer younger children than four by general words. What possible construction can be given to the latter, if that is not the effect of it? It must be rejected, unless it means, that if he does not make that specific appointment, the younger children are to take, without regard to their number.

Upon the other question, the right to priority is with the Plaintiffs.

Mr. *Richards* and Mr. *Wetherell*, for the Heir at Law. The existence of four younger children is made a condition precedent. The charge does not take effect but upon the performance of two conditions; marriage, and the birth of more than four children. The words "but not otherwise" are added. The lady had a great fortune of her own; which was settled by another deed.

Mr. *Hall*, for the children of Sir John Parker Mosley. The term under which the charge is made in favor of the children of Sir John Parker Mosley, was in existence, and all the uses of it, at [* 258] the *time of the execution of the settlement. The instrument executing a power is considered as part of the deed creating it; and therefore the moment the term is directed to be used, it has its existence in the order in which it stands; viz. at the death of Sir John Parker Mosley, and before the estate of Oswald Mosley took effect.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is an appointment in favor of four or more children; and the farther trust of the term is, in case no such appointment shall be made in favor of four or more children, to raise 10,000*l.*, for the portions of all and every the children. The father by his will expressly reciting, that he had executed the power in part by charging 10,000*l.* in favor of his younger children, in case he should leave four or more

younger children, charged 10,000*l.* more in favor of his younger children. I am afraid, it is impossible to get over the words; though it is very hard. The first appointment has never arisen; and then he charges the second sum. He must have known, he had then no more than four children. It was very foolish in him, knowing, he had only three younger children. If he meant the first appointment not to be contingent, it would have been very easy to have said so. It seems to me, as if according to the meaning of the settlement he had not agreed to charge, except there should be four younger children. It is a provision for that event; if there are four, and not otherwise; and I must suppose, the other children are provided for *aliunde*. It appears there were two settlements; the one, of the husband's estate: the other of the wife's. That explains it. I cannot construe it otherwise than as a condition precedent. I think, there is great reason to contend, that if he had not made the will, these children would have had nothing; notwithstanding the latter provision; which has been relied upon. I have struggled hard in that case: but fortunately he has made a will. I am very well satisfied upon this point.

As to the other question, it is not material, that it is strange the father should postpone his own children. The principle has been stated at the bar; that the moment the power is executed it is as if in the original deed; and in that way it will stand now. This power is subject to his father's life-estate. Therefore it must be taken, as if made subsequent to the life-estate of his father. As soon as he has executed that power that term comes in immediately *after the estate of his father, before the other [*259] terms, but not before his life-estate. This charge of 10,000*l.* therefore is the first incumbrance upon the estate. Suppose, the power was not for a provision for younger children, but to secure a jointure to his wife: according to the Defendants, that jointure would be postponed to his younger brothers' fortunes. What pretence is there for that? The moment he raises the term it is put in after the life of his father; to which the power is subject. I cannot in point of conveyancing put it in any where else. It may be a blunder of the conveyancer. Perhaps, if it had been pointed out, they would have said, this provision should be subject to the life-estate of his father and the provision for his younger children. That it is strange, must not be talked of, either upon a deed or a will: but I must ask, what is the construction (1). If the estate was deficient, this might be a very material question: but that is not the case.

I shall order the younger children's fortune to be raised by mortgage of a certain part of the Lancashire estate, and the others, by mortgage of another part. If they have sufficient to raise the sum, the whole estate need not be comprised in them.

Declare, that the Plaintiffs, the younger children, are entitled in

(1) *Ante*, vol. iv. 329, 340.

use of Thomas Dugate, the father of Elizabeth, and Ezra Willis, her uncle, and their heirs, certain estates and premises, described, to the use of Randall and his heirs until the marriage; and after the marriage, to the use of Randall and his intended wife during their lives and the life of the survivor; and after their decease then to be sold, in trust, that the money should be paid and distributed among such children as they should have during their lives at their decease; and, in default of such issue, to the right heirs of Elizabeth Dugate. He farther covenanted with Thomas Dugate and Ezra Willis, their heirs, executors, and administrators, that he, the said Robert Randall, or his heirs, would within three months next after the intended marriage convey, release, surrender, and assure, all the said messuages, lands, and tenements, with their appurtenances, unto the said Thomas Dugate and Ezra Willis and their heirs, to such uses, intents, and purposes, as were therein before mentioned, and to and for no other use, intent, and purpose whatsoever. The articles then proceeded in these words:

“And also all and singular my personal estate of what nature or kind soever.”

By the same articles Thomas Dugate in consideration of natural love and affection to his daughter, and for other considerations, agreed to make and pay her equal in fortune with his other daughter Ann Dugate at the time of the decease of him and his wife; and Ezra Willis covenanted with Randall, that he would after the decease of his wife Dinah Willis give and dispose of by will or otherwise all his personal estate, to be so divided between Elizabeth Dugate and her sister Ann Dugate, in case the marriage should be solemnized.

[* 263] *The marriage was celebrated soon after the execution of the articles. They were very unequal in point of age: he being forty-three; she, only eighteen. She was very averse from the match: but was persuaded by her friends: her father being in bad circumstances. Randall received no fortune from her father: but about 20*l.* were laid out for clothes.

By indentures of lease and release, dated the 4th and 5th of November, 1776, after the marriage, between Randall and his wife of the first part, Thomas Dugate of the second part, and Ezra Willis of the third part, Randall conveyed and assigned all the personal

veyed to her heirs. Afterwards the husband and wife were divorced for the cause of adultery on his part; and it was decided that the general provision of law, by which, upon such a divorce, the wife would have been restored to the possession of her real estate, was controlled by the indenture, so that the husband, if he should survive her, would be entitled to the income during his life. *Babcock v. Smith*, 22 Pick. 61.

It seems that the trusts above mentioned are not inconsistent with the ante-nuptial agreement as recited in the indenture; but if there were any discrepancy, it does not of itself, unaided by extraneous evidence, support a claim for reforming the contract agreeably to the recitals, since it cannot be known whether the intention of the parties is expressed in the recital or in the other clauses of the instrument. *Ib.* See, however, *Tabb v. Archer*, 3 Hen. & Munf. 399, in which the language of the recital was allowed to control the subsequent specifications in the articles. See also *Gee v. Gee*, 2 Dev. & Bat. Eq. 103; *ante*, *Doran v. Ross*, 1 W. 59, note (a).

estate and effects, of which he was possessed at the time of the execution of the said articles, to the same uses as the said messuages, lands, &c. were by the said articles covenanted, and by the said settlement actually settled and assured. Thomas Dugate and Ezra Willis did not enter into any covenants upon this settlement.

Randall having lived upon very bad terms with his wife, died upon the 30th of May, 1797, without leaving any issue. By his will, dated the 17th of September, 1794, he devised to Dinah Willis, his half-sister, widow of Ezra Willis, who died before him, all his real estates, except those comprised in the articles, to hold to the said Dinah Willis, her heirs and assigns; and he appointed her sole executrix.

At the time of the execution of the articles Randall had personal property to the amount of above 6000*l.*: a considerable part of which consisted of stock. His real estate at that time did not amount to more than 50*l.* a-year; the whole of which was comprised in the articles and settlements. Very soon after the marriage he sold his stock; called in his personal estate; and laid out the produce in the purchase of real estate, of the value of about 130*l.* per annum. Upon the death of Ezra Willis, Randall received 844*l.* 2*s.* 11 1-2*d.* in right of his wife; which was taken by agreement as her distributive share; and 600*l.*, part of that sum, was given by him to Dinah Willis in consideration of her long services as shop-woman in his trade as a grocer. The personal property, which he possessed at his death, was not sufficient to answer his debts.

*The bill was filed by his widow; praying, that the [*264] settlement may be set aside, so far as it varies from the articles; and that the Plaintiff may be declared entitled to a satisfaction out of the real estates, so devised by Randall, and also his personal estate, to the amount or value of the personal estate, which he was possessed of or entitled to at the execution of the articles; that for that purpose an account may be taken of such personal estate; and in case such personal estate or any part of it was laid out in the purchase of the real estates so devised, then that the Defendant Dinah Willis may convey, &c.; and account for the rents and profits; and in case the Court shall be of opinion, that the Plaintiff is not entitled to have the real estates conveyed in or towards satisfaction of so much of the articles as relates to the settlement of the personal estate of Randall, or in case the whole of such personal estate was not laid out in the said real estate, then that the Plaintiff may receive a satisfaction to the amount of the personal estate, of which Randall was possessed at the execution of the articles, or so much as was not laid out in real estate, out of the personal estate, of which he was possessed at the time of his death, if sufficient; and if not, the deficiency to be raised by sale or mortgage of the real estates devised, or such as were purchased with the personal estate of which he was possessed at the date of the articles, or the rents and profits.

The Plaintiff went into evidence of the proposal by Randall to

settle the whole of his property, or, as other witnesses represented his expression, every shilling he had in the world, upon her and her heirs; and that, if there should be no children, it should go into the Dugate family; that he informed the attorney, who drew the articles and the settlement, that all his property was to be settled upon his wife, in case she survived, and there should be no children; and that he expressed himself perfectly satisfied with the offers of her father and Ezra Willis. A great deal of evidence was also produced of declarations by Randall, that he would lay out his personal estate in land to cheat and defraud his wife.

— Stuckey deposed, that Randall declared to him a few years after his marriage, that apprehending he had settled all his personal property upon his wife before marriage, he had consulted Counsel, (whom he named) as to his right of disposing of such personal [* 265] property by will or in his life-time, and purchasing land with the money; that by the opinion then given he was informed, there was a flaw in the settlement; and he might sell his money out of the funds, and lay the same out in the purchase of real estate; and dispose of the same, to whom he pleased, notwithstanding his marriage settlement; and Randall then declared, that he would dispose of such personal property, and lay it out in the purchase of real estate; and thereby cheat his wife of the benefit of her marriage articles or settlement; and that she should not have a single farthing.

Several other witnesses stated conversations to the same effect.

The gift of the 600*l.* to Dinah Willis was not disputed at the hearing.

The *Attorney General*, [Sir John Mitford], *Solicitor General*, [Sir William Grant], and Mr. Cooke, for the Plaintiff. The articles admit of only two constructions; either his personal estate at that time, which seems to be the meaning upon the evidence, or his personal estate at the time of his death; and in that case that covenant ought to be inserted, which always is inserted, that, if that personal estate should be converted into real estate, that should be taken as personal estate between the persons entitled under the settlement, as in *Colborne's Case*, some time ago. The bill has proceeded upon the idea, that the personal estate at the date of the articles was intended; because the evidence shows clearly, that was the understanding of the parties. The proposal by the evidence appears to be to settle his whole fortune: other witnesses use the word "property:" others say, "every shilling he had in the world." It will make some difference; because he had considerable acquisitions afterwards. There might have been some doubt as to the construction: but if your Lordship would not have held him to the strict letter, bound to settle all his personal estate at that time, and to give up his trade for that purpose, yet he would have been compelled to settle what he could conveniently; his stock, for instance. Upon such a covenant he ought to have put it out of his power to disappoint her by will, at least; though it might be liable to accident.

The evidence is, that his purpose was to cheat his wife. If we show, that the conversion of the property was a designed fraud, it could not possibly stand, upon such a covenant even in a settlement; according to the final decision of ** Jones v. [266] Martin (1)*. This man clearly understood, that it was the

(1) 3 Anst. 882. The following account of that case contains a more complete detail of the very particular circumstances, upon which the decree of the Court of Exchequer was reversed: with a note of the Lord Chancellor's argument in the House of Lords upon that occasion:

By articles executed upon the marriage of Mr. and Mrs. Jones in 1767, T. Martin, the father of Mrs. Jones covenanted to leave her upon his death certain tenements; and that he would at his decease by his will give and leave her a full and equal share with her brother and sister of all the personal estate of him, the said T. Martin, to be had, held, and enjoyed, immediately after the decease of himself and his wife, and not before. He also covenanted to pay them 100*l.* a year during the lives of himself and his wife.

Similar covenants were entered into by the father of Mr. Jones; but he died in 1770 insolvent, and his real estates mortgaged beyond their value; and his son and daughter-in-law never derived any benefit from his covenants.

The sister of Mrs. Jones died without issue in 1779; and her mother Mrs. Martin died in 1715. At the date of the articles, Martin, the father, possessed considerable property, real and personal: the greater part of his real estate consisting of freehold premises, malting and fishing houses at Yarmouth, used for the purposes of his trade; which he discontinued in 1774; at which time it was evidently a losing concern. He also enjoyed a place of considerable profit. In the period from 1769 to 1786, he sold all his real estates; and invested the produce together with his personal estate in Bank Stock. Four fifths of the real estate had been so disposed of before 1775. In July, 1783, he laid a case before Lord Kenyon, then at the bar; who gave an opinion, that Mr. Martin was not restrained by the covenant from investing any part of his personal property in real estate in his life, or giving away any part of his personal estate; provided the gift were absolute, and to take effect in his life time. Immediately afterwards Martin transferred into the name of his son 3000*l.* Bank Stock, and afterwards, down to 1788, other sums, to the amount, with the first transfer, of 4448*l.* Bank Stock; the son verbally promising to pay his father the dividends during his life. The money, with which the Bank Stock was purchased, was in the whole 5735*l.*; of which 3072*l.* was produced by the real estate, and 2663*l.* was personal property. Both Mr. and Mrs. Jones and Martin, the son, had at various times received money from Martin, the father; but the sums so received by Martin, the son, considerably exceeded those given to Mr. and Mrs. Jones. The value of the Bank Stock transferred, which was produced by the personal estate, was nearly equal to the benefit received by Mrs. Jones from her father under the articles and otherwise, independent of what she would be entitled to at his death; and it appeared, that he considered that part of the Stock transferred to his son as an equivalent for such benefit received by his daughter.

In 1788, after all the Stock had been transferred to the son, another case was submitted to Lord Eldon, then at the bar; who upon the whole inclined to think, the transfers to the son could not be set aside as a fraud upon the marriage articles; but considered the case as very doubtful.

In 1789, Martin, the son, sold out the Bank Stock, for 8050*l.*; which he invested in India Stock. This was done without the privity of his father; and the son continued to pay him the amount of the dividends of the Bank Stock; which were less than the dividends of the India Stock purchased.

In 1792, Martin, the father, died, at the age of ninety. By his will, made in 1786, reciting the articles, as far as they related to the real estates, he devised them to the uses of ** the articles*; and reciting the provision in *[267]* the articles relating to his personal estate, and the death of his youngest daughter, in performance of his covenant he left all the personal estate he should die possessed of, subject to his debts, &c. in effect to be equally divided between his son and daughter.

intention, that his wife should have the benefit of his personal estate in some way. Confessing her right he contrives to disappoint her. His avowed purpose is to cheat her of that, to which by the very expression he admits her right but for that act. Upon *Trevor v. Trevor* (1) *West v. Erissey* (2) and that class of cases the

(1) 1 P. Wms. 622, and other books there referred to.

(2) 2 P. Wms. 349, and see Mr. Cox's note. These cases are arranged and discussed by Mr. Fearnie, Cont. Rem. 123, &c. 4th and 5th editions.

The personal estate remaining to be divided under the will amounting only to 90*l.*; the bill was filed by Mr. and Mrs. Jones against her brother; praying an account and an equal distribution of the Stock, that had been transferred to the Defendant, and of all the property received by him in the life of his father, as being a fraud upon the marriage articles. The answer insisted on the transfers, as a *bona fide* gift to the Defendant.

For the Plaintiffs several letters were produced from the Defendant to his broker. By the two first letters, dated the 2d and 3d of August, 1783, it appeared, that the father had directed, that the transfers should be made to the son's name, and that the dividends were to be paid to the father and mother during their lives and the life of the survivor. In the letter, dated the 3d of August, 1783, the Defendant expresses himself thus:

"I signify again, that the interest of the whole 3000*l.* is to be remitted by my desire to my father and mother during their lives, as often as it shall become due."

In another letter, dated the 16th of June, 1785, the Defendant says, "You will please to remit, as usual, to my father the dividends due upon the Stock transferred to me."

In a letter, dated the 10th of February, 1786, the Defendant confidentially asks the opinion of the broker, in this way: concerning the stock, which now stands in my name. I presume, nothing more is requisite towards ascertaining it to be my legal property. To be more explicit, I beg to know, whether it be necessary, I should personally accept the stock by signing the books before my father's death. He wishes to avoid giving any room for dispute; and therefore hopes, that the mode of receiving the dividends of my stock will not affect my right in it."

In the same letter the Defendant asks, whether the placing the dividends of his stock, as they become due, to his father's account will not wear the appearance of his having an interest in the stock, and create doubt of the Defendant's right to it after his father's decease; declaring the truth in confidence, that his father has transferred his stock to him in his life; which he had a power of doing, but could not do it by his will. The letter then proceeds to put the question, whether "the dividends of my stock being placed to his account, although he receives them by my consent, will any way affect my right in the stock. I should imagine, that in virtue of the letter of attorney I sent you to purchase stock and receive the dividends, you do it in my name, and therefore it is immaterial, whether you remit them to me or to any other person at my request."

By another letter to the broker, dated the 25th of April, 1788, the Defendant acknowledges the receipt of a letter, "informing me of your having transferred 300*l.* Bank Stock from my father's account into my name." He also acknowledges the sum total "now in my name 4448*l.*"; and he directs the interest to be remitted to his father during his life.

By another letter, dated the 12th of December, 1789, the Defendant desires the broker to remit the dividends to him; as it will make no difference to his father; and he asks the price of Bank Stock at the time of the several transfers to him.

[* 268] * Letters from Martin, the father, to the same broker were also produced. In one of these letters, written in 1788, Martin, the father, desiring the broker to enter the money remaining in his name in the name of his

settlement must be rectified. It was not competent to them to come to a new agreement.

Mr. *Mansfield* and Mr. *Richards*, for the Defendant. It is very extraordinary, that this demand was never set up for thirty

son uses this expression: "so that what money I have in the Bank is in my son's name."

In another letter, dated the 24th of April, 1788, he says, "I have received your favor; advising, you had advised my son, that the 300*l.* of mine was turned over in his name, and the interest mine so long as I live."

There was evidence of frequent declarations by the father, that he had transferred the stock to the Defendant; reserving only the dividends for his own life.

The imputation of influence was supported by several mysterious letters from the father to his daughter and son-in-law, and ambiguous expressions in conversation, and two statements in writing, admitted to have been prepared by the Defendant; in which his father justifies what he had done; declaring, that he considered himself at liberty under the articles to give to his son any part of his property during his life; and that he had always intended, that the real estate or the produce of it should go to him.

The appeal of the Plaintiffs from the decree of the Court of Exchequer was argued at the Bar of the House of Lords on the 15th, the 18th, and the 21st of June, 1798. On the 26th of June, the Lord Chancellor spoke to the following effect:

The consequences would be bad, if this decree was to pass into a precedent: but I shall determine without particular regard to general consequences. I will take the case on its own circumstances. Cases in Equity on such subjects as the present do not often govern each other: they rest for the most part on the facts of each particular case.

This covenant was stated by the Counsel for the respondent to be vague and idle, unmeaning and insecure. It is not however an unusual covenant in settlements. Many marriages are entered into on such covenants: and they are not inexpedient. They are entitled to favorable consideration. Such a covenant holds out a prospect, that the party, who marries into a family, shall continue a member of that family; and it provides, as it were, a pledge, that he shall be considered, and may consider himself, part of such family till the death of the person who enters into the covenant. But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child before another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not however exercise his power by an act, which is to take effect, not against his own interest, but only at a time, when his own interest will cease.

The failure of the appellant's father in his engagements might reasonably pique the respondent's father. But that is not a sufficient reason or excuse for what he has done. Indeed it has nothing to do with this case.

* The greater part of the real property, which belonged to the respondent's father was for the purpose of carrying on trade, which he had long been engaged in. He moreover enjoyed a place of considerable profit. When he sold off the malting and fishing houses, he performed an act of economy. When he ceased to trade, it was bad property. He could only let them, instead of using them for traffic. Accordingly he sold them piece-meal, as opportunity offered. [* 269]

In 1783, sentiments not favorable to the appellants entered into the old gentleman's mind; I do not pretend to say, whether by suggestion or not; and he proceeded to carry certain intentions into execution: but still he continued in the enjoyment of all his property till the time of his death. After his death it appeared, that the clear residue of his personal estate amounted to 90*l.*; and the share of the appellants under the covenant was of course 45*l.* This naturally excited

years. At this distance of time it would be unreasonable to give any other construction to the articles than that of the settlement. Nothing appears as to these articles. They were not with the settlement: but were left in the possession of the attorney, who prepared both, probably with the drafts of the settlement as a

great surprise; and in the event produced the present bill and subsequent proceedings. It was soon discovered, that 4675*l.* stood in the son's name in East India Stock; and it was traced to be the produce of 4448*l.* Bank Stock; which had been sold out by the respondent in 1789, and invested by him in East India Stock. The Bank Stock had been transferred at different times from the father to the son. This transfer was not an absolute gift; for the father had the dividends, not of the East India Stock; for that transaction had been carefully kept back by the son from the father's knowledge; but the father received out of the dividends on the East India Stock a sum equal to what the dividend would have been in Bank Stock; and the respondent appropriated the surplus of the dividends to his own use. This change from Bank to East India Stock is admitted to have been clandestinely made by the son, and without the father's knowledge.

The transfers from the father to the son were not to put the son in the unqualified and absolute possession of the Stock, but on certain terms and under certain trusts. These trusts were not however reduced to writing: nor were any means used to secure the father in the receipt of the dividends. Then the question is this: Has the Court any evidence, by which it can trace, what was the trust, on which the transfers were made, and what was the real nature of the transaction; for it must not now be contended with me in the argument, that this was an absolute gift without any trust. Then what was the trust? I will refer your Lordships to the respondent's letters. One is dated the 2d August, 1783; the next is the 3d of August, the day after. This letter shows, that the father had given his own directions, that the transfers should be made to the son's name, and that the dividends were to be paid to the father and the mother for their lives and the life of the survivor; and it is to be observed, that such was the provision of the covenant in the marriage articles. The letter of the 10th February, 1786, is a most material and remarkable one. In this letter your Lordships will observe a confidential disclosure made by the respondent to Mr. Newland, and a degree of consultation with him, for the purpose of learning what more could be done to secure the son, in what? What does the son himself call it? Not "*my Stock*;" but his expression is, "*the Stock which stands in my name*;" and he adds, "I presume nothing more is requisite towards ascertaining it to be my legal property;" and then he says, "in one of your letters, with which I was favored, you signify, that you place the dividends of my Stock, as they become due, to my father's account: now will not this wear the appearance of his having an interest in the Stock?"

It is plain, that the respondent felt the transaction strongly and acutely; and that the suspicion, which he entertained as to the validity of what had been done, recoiled on his mind every moment. As an honest man he never could call this stock his own.

So again as to the father's letters. They do not say "*given to my son*:" no such thing: but "*entered in my son's name*;" and again, "*what money I have in the Bank is in my son's name*." "The 300*l.* of mine turned over in his name and the interest mine so long as I live."

When this transaction is unmasked, the whole object appears to have been, that the stock should be found in the son's name at the father's death, to defeat the father's covenant in the appellant's marriage articles.

A great deal of reasoning and disguise is made use of in the declarations: but the whole scheme and intention of them apparently was to gloss over the transaction. The respondent had no right in Equity to change the nature of the stock as he did. The private transfer was a breach of honor and confidence. The father did not mean to part with his property in his stock. Had he wanted any part of it in the course of his life, he might have called upon his son for what his wants required; who perhaps would not have been very well pleased with such a requisition.

piece of waste paper, which every one supposed was done with after the execution of the settlement. I believe, the articles were abandoned, and the settlement made upon another footing. It is impossible, that the attorney, who prepared the articles upon the instructions of all parties, would have omitted the covenants of the father and uncle, if at the execution of the settlement those covenants were intended to stand. That shows, they came to a new agreement. Such a covenant as this was never entered into. It would extend to his wearing apparel and furniture, the wine and beer in his cellar (1). There must have been a considerable variation from the articles, if a settlement had been made upon them. It is admitted, his debts must have been taken out: but they would not allow him an article of clothing. The attorney consulted on both sides carries the intention into execution by the settlement. It can only be applied to the personal estate he had at his death. That is all any man in his senses will covenant so to settle. This covenant is in effect no covenant. That in *Jones v. Martin* was of the same sort; to leave equally among his children all his personal estate at his death. It is not uncommon. It is said to be ineffective. So it is. It does not bind him from defeating it by converting personal prop-

(1) *Lewis v. Madocks*, post, vol. viii. 150; xvii. 48.

The covenant did not prevent the father from giving the stock out and out; but if he chose to keep it, he kept it applicable to the general engagements he had entered into for his family. Lord Cowper said in the case of *Turner v. Jennings*,* that if the father was permitted to act according to the facts of that case, it would put an end to the custom of London. He was a great man; and to his Lordship's doctrine I declare my assent. So, of such a covenant as the present. Here also the property continued to answer all the father's own purposes during his life. If a father will be partial, and will give a preference, he must give against himself; and not make a mere reversionary gift. He should immediately feel himself so much the poorer for his gift. If he is willing to suffer that, let him then yield to the impulse of his partiality. But if a father may effectuate his purpose by any thing short of this, it will furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants: which ought to be most honorably observed (a).

* If the son had become bankrupt, I rather think, his creditors might [*270] have taken the stock; for they might have said, as against the father, "you have allowed your son to appear as the owner of this property."

If the father became bankrupt, his creditors would have had a clear case of it; and would have had no difficulty in obtaining the stock again. Suppose the son to have died in the father's life time: might not the father have called on the son's representatives for a transfer of this stock? He would have had no other evidence of the trust than the evidence present in this cause, coupled with the receipt of the dividend from time to time; which indeed would have been strong evidence. The father therefore must have made out this transfer to have been a transfer in trust for himself; and I think, that he would have reached that point in a Court of Equity.

Upon the whole I therefore conclude, that so much of the decree below as declares, that the East India Stock and the dividends thereon made no part of the father's personal estate at the time of his death, be reversed: and, being reversed, that in taking the account the said East India Stock and the dividends thereon be considered as part of the father's personal estate, and subject to his covenant in the marriage articles.

* 2 Vern. 612.

(a) See 1 Story, Eq. Jur. § 382.

erty into real estate, wasting, spending it, or giving it away; provided it is given *bona fide*, and upon no trust for himself. The covenant cannot with sense operate upon any thing else, without great particularity. A man may covenant, if he will, as to all the personal estate he shall ever acquire. The execution of the settlement is much better evidence of the meaning of that absurd covenant than the words found in the articles. But it does not rest upon that merely. What has been the conduct of these parties? It is said, it was supposed, the settlement had exactly executed the articles, and the mistake has been but lately discovered. The attorney lived six or seven years. It never occurred to him, that any part of this property was to be secured: nor to the two trustees; one, the father of her, who was materially interested to have the property secured. Part of it was stock; which might very easily have been invested; which was so obvious, that it could not escape the attention of any one. Not many years after the marriage the [* 272] husband was laying out his money in real *estate. It is strange, the Plaintiff's right should not be adverted to by some of the parties. The bill and the evidence state, that he consulted Counsel with a view to avoid his wife's claim.

The next point is perfectly new, particularly after *Jones v. Martin*; that, supposing it too late now to make the settlement different from what it is, yet the covenant in the settlement is so absurd, that your Lordship should correct it, or prevent an evasion of it by the purchase of real estate. Upon what ground? What qualification of the covenant would they have? They suppose the settlement to have been articles only. This has no resemblance to the common case of articles giving the estate to the husband and the heirs of his body. A Court of Equity never will totally change the nature of the covenant. The Attorney-General suggested a covenant to restrain him from converting the personal estate into real estate. I never saw such a covenant. The effect would be to tie up, not only the personal estate he then had, but all he should ever acquire. A covenant by a man to leave at his death was in *Jones v. Martin* admitted to be a very common covenant; though it was admitted, it might be evaded upon the ground, that prevailed in that case. It was argued in the House of Lords, that in effect it was a gift at the death; and the cases upon the custom of London, and, among them, *Tomkyns v. Ladbroke* (1), were cited, and decided that case. Those cases, though not exactly cases of covenant, come very near it; for the woman of course trusts to the interest under the custom. Those and many more such cases all go upon the question, whether the property was absolutely disposed of by the husband in his lifetime, or not: but no question was ever made, that if a freeman of London chooses to defeat the interest of his wife and children, he has the power to do so, because the custom operates only upon the personal estate he shall have at his death. So does this covenant.

It is begging the question to say, it is a fraud upon the covenant to convert the personal estate into real. It is no fraud upon it, if the covenant does not prevent it.

The gift of the 600*l.* to Mrs. Willis for her services has not been impeached ; and to do so would be directly contrary to all the cases, and to *Jones v. Martin* ; in which it was admitted, that if the gift had been real, it would have been good ; and the only *question was, whether there was a trust ; and, whether [*273] as the father reserved the benefit to himself for his life, and gave only a reversionary interest to his son, it could be considered a complete gift. The House of Lords held it was not ; admitting, that if it had been a complete gift, it would have stood.

LORD CHANCELLOR [LOUGHBOROUGH]. I do not think it necessary to trouble the Plaintiff's Counsel to reply. The bill comes before me now, praying, upon the ground of an article, that the settlement executed after marriage, as far as it does not execute the intention of the article entered into before marriage, shall be rectified ; as it happens, in the event, for the benefit of the wife : but it must be determined exactly upon the same principle as if he had a numerous family of children. If the act he did would not have been valid in that case, it cannot be valid against the wife. Whatever disagreement existed between them, whether he was founded, or not, in his opinion upon her conduct, he had no more right to defeat her claim than he had to defeat the whole object of the settlement.

Ever since the case of *West v. Erissey* it has never been a doubt, that if a settlement executed subsequent to marriage, purporting to be in execution of articles entered into before marriage, does not take the effect, though it follows the words, of the articles, this Court will rectify that error in the frame of the settlement. It is obvious here, that the settlement so drawn is clearly and demonstrably an improper execution of the articles : improper in point of judgment ; for the marriage taking place upon these articles, and no other written document of the agreement between them, and the articles formally executed under seal, whatever the rights of the parties are by the articles, it is totally impossible, that any parties to these articles could be discharged from any one obligation imposed by the articles. The first thing, that occurs upon the settlement, three months having been given for the preparation of it, is, that the covenant of the father is omitted. It is of no consequence, that his circumstances were at that time bad. He is alive. It is of no moment, whether in point of value it might be useful to the wife and children. That is matter of mere speculation. It might not be likely, that much might come from the father : but the attorney had no right to leave it out. It was clear *mistake [*274] of the attorney. The covenant of Willis, a man of substance, is also omitted. That covenant was likely to be attended with considerable benefit. In fact, I suppose, they found it better to take the distributive share under the agreement than according to the strict covenant : or perhaps the articles were unknown : but if

they had been known, it was a fair option to take the distributive share, about 800*l.*, rather than wait the specific performance of the covenant; which must have been suspended during the life of Dinah Willis. In both those instances there is a variation from the articles. The settlement, which is a peculiar settlement, is, that the estates described, which are all the real estate he had, shall be conveyed to trustees to the use, after the marriage, of him and his wife, for their lives and the life of the survivor, and after their decease to be converted into personal estate, and divided equally among the children, and in default of such issue to the right heirs of the wife. After stating this to be the effect of the agreement of the parties as to his real estate, it proceeds thus:

"And also all and singular my personal estate of what nature or kind soever."

In the exposition of these words there is one construction, they obviously cannot bear: that is, a specific settlement of every article of personal estate, that within the period allowed for the settlement he might be possessed of. Personal estate is so fluctuating in its nature, that it is impossible to make every thing, every chair and stool, the provisions in the house, &c. the subject of a settlement. The meaning is truly expressed, but defectively executed, in the settlement; that it is an engagement as to the personal estate, when it could be ascertained, namely, at his death, giving the use to him clear and absolute, and the residue at his death to be the subject. But it is to be settled so, that it cannot be disappointed by any act by him; and nothing is more obvious than what ought to be the covenant; that easy, plain, covenant, that the lands, he might purchase, should with regard to the wife and children, the objects of the settlement, be considered as personal estate: otherwise it conveys no right, a chance, and nothing but a chance; which the Court will never intend upon an article.

It is said, there have been many settlements, in which a covenant by the husband, or the father of the wife, as in *Jones v. [* 275] Martin*, * that the personal estate shall be left in a particular manner, has been confined to what he should leave at his death. If a formal deed was executed before marriage, containing such a covenant, it is impossible, that I could do any thing with it. But an article is only the head and minute of an agreement, not to be followed literally (a). In *West v. Erissey* the deed, that was executed, an article before marriage, was to settle the estate in such a manner, that the husband would have had an estate tail. The settlement copied the very words of the articles: but the House of Lords held, that the person who was to execute that article, if he had used proper skill, ought not to have taken the very words, because he gave the estate tail to the father; which could not be the intention; but that he ought to have limited an estate for life, with re-

(a) *Tabb v. Archer*, 3 Hen. & Munf. 399. Settlements in pursuance of marriage articles must not always be made according to their legal import, but in conformity with the intention of the parties. *Smith v. Maxwell*, 1 Hill, 103.

mainders in strict settlement. What is the ground of that determination? The words were simple and plain in the articles; and the same words were taken in the settlement: but the effect was to put it in the power of the father by an act, a formal act, and which it was to be presumed he would have done, to defeat the object.

In this case I take the sense of the articles to be, that he should leave all his personal estate at his death tied up in the same manner that the real estate was directed by the settlement: so that it should not be in his power, if he quarrelled with his wife or children, by laying out that personal estate in land, and giving it to any purpose he thought fit, to defeat the object. He might have done, I will not suppose so harsh a thing as giving it away from them; but he might have done this: he might have limited strict estates for life to his children: but that would not be within the purpose of the articles; and the children might have reclaimed it. The person therefore, who drew the settlement ought to have inserted the covenants of the uncle and the father, all within the consideration of the settlement, and the object of the marriage; and for the same reason he should have added that short and obvious covenant by the husband, that what real estate he should purchase should be considered as to the objects of the settlement as personal estate.

As to the other point, whether the gift of the 600*l.* to the Defendant is good, there is no occasion to discuss that. They do not quarrel with it. * But I do not think, if the [* 276] article had been brought before the Court for execution, upon such a marriage, and the case of an infant, where it is impossible, that any thing, that would defeat the effect of the settlement, could prevail, if he had made a gift, choosing to deprive himself of it, it would have been held good.

The prayer of the bill is very correctly confined to the real estate purchased with the personal estate. They do not pray, that all the real estate he died seised of may be conveyed; for if any estate descended to him during the marriage, that was not a subject of the settlement. Upon the fact all the real estate he had at his death was the purchases made by him out of the personal estate.

The decree declared, that upon the true construction of the articles the personal estate, which Robert Randall was possessed of at the time of the execution of the said articles, and which hath been since laid out in land, ought to have been subject to the provision made by the said articles and settled for the benefit of his wife and children, in like manner as the real estate, which was the object of the settlement. An account was directed of the personal estate, which the testator was possessed of at the time of the execution of the articles; and the Master was directed to inquire, whether such personal estate or any and what part thereof was laid out in the purchase of all, or any and which, of the estates devised by the will of the testator to the Defendant Dinah Willis; and it was ordered, that the said Defendant do convey such estates as the Master shall

find were purchased with such part of the testator's personal estate, as the testator was possessed of at the time of the execution of the articles, to the Plaintiff, or as she shall appoint. An account was directed of the rents and profits of the estates purchased with the said personal estate, come to the hands of Dinah Willis, and an account of the other personal estate of the testator, come to her hands, and of his debts, &c. The costs of all parties were directed to be paid out of the testator's estate (1).

1. UPON application to a Court of Equity to carry marriage articles into execution, the Court will decree it to be done in the strictest manner, not leaving it in the husband's power to defeat and annul the substantial intent of the articles by confining the performance to the mere letter: *Streatfield v. Streatfield*, Ca. temp. Talb. 181: for, in Equity, articles are considered as minutes only, and the Court, where it finds the words short and defective, will presume what was the probable intent. *Marquis of Blanford v. Duchess of Marlborough*, 2 Atk. 545; *Taggart v. Taggart*, 1 Sch. & Lef. 87; *Trevor v. Trevor*, 1 P. Wms. 631. Even when such a settlement has been actually executed, and does not rest in articles, the Court, by virtue of the contract, may be enabled to deal with the settlement so as to effect the intention of the parties, and, with that view, to put upon technical words a sense which, legally and strictly, would be inadmissible in other cases. *Cholmondeley v. Clinton*, 2 Meriv. 347, citing *Seymour v. Boreman*, a note of which is to be found in Nels. 121. And it is quite clear the operative part of a family settlement may be reformed, so as to accord with the intention declared in the recital. See, *ante*, the note to *Doran v. Ross*, 1 V. 57.

2. The present case, Lord Eldon has observed, was one involving a good deal of difficulty, some part of which his Lordship thought the decree had not very satisfactorily disposed of; (*Lewis v. Madocks*, 8 Ves. 155;) and when the case just cited was again brought on for farther directions, (as reported 17 Ves. 57,) it was determined that an estate, purchased, as in the principal case, with money bound with a trust or obligation, did not specifically belong to the party who had a right to the money, (which was Lord Rosslyn's decision,) although the personality laid out in lands continued, as to the party in whose favor the obligation had been entered into, still personal estate, with the amount of which the lands were chargeable. So, Lord Mannors decided, in *Savage v. Carroll*, 1 Ball & Bea. 285, that money may be followed as a charge upon the land purchased with it, but no farther. And to the same effect is the case of *Lane v. Dighton*, where Sir Thomas Clarke, M. R. declared that money bound by marriage articles, but which had been invested by the husband in the purchase of real estate, ought to be considered in the same plight and condition as if the same had not been invested; which decree was affirmed by Lord Hardwicke, and the principle thereof distinctly recognized by Sir William Grant in *Lench v. Lench*, 10 Ves. 517. Though Courts of Equity are cautious how they follow money into land, (*Ryall v. Ryall*, 1 Atk. 59,) and never do so unless the money can be "ear-marked," (*Perry v. Phillips*, 17 Ves. 183; *Denton v. Davies*, 18 Ves. 502,) yet it seems now settled, that when the fact of the investment of money, bound with a trust or obligation, in land is distinctly proved, (for which purpose parol evidence is admissible,) there the money may be followed. *Lench v. Lench*, *ubi supra*. The ground upon which parol evidence is admitted in such cases seems to be, that trusts by implication, or by operation of law, are not within the Statute of Frauds. *Young v. Peachey*, 2 Atk. 257; *Willis v. Willis*, 2 Atk. 71; *Anonymous case*, 2 Ventr. 361.

3. A person may, by covenant or settlement, bind all the property of which he shall die possessed, and yet retain a free power of disposition during his life, by expenditure even the most improvident, or by gift, if absolute and immediate, — against which his own interest would afford some security: *Lewis v. Madocks*, 17

(1) *Post*, *Lewis v. Madocks*, vol. viii. 150; xvii. 48; *Garthshore v. Chalie*, x. i.; *Cochran v. Graham*, *Fortescue v. Hennah*, xix. 63, 67; *Prebble v. Baghurst*, 1 Swanst. 309, upon a bond to settle real estate, if the obligor should during his life become seized of any. *Cotteen v. Missing*, 1 Madd. 176.

Ves. 50; *Jones v. Martin*, 5 Ves. 266 (in note); *Bradish v. Bradish*, 2 Ball & Bea. 489: but he will not be allowed to defeat his covenant by any disposition which is in effect, though not in form, testamentary. *Gregor v. Kemp*, 3 Swanst. 404, n.; *Fortescue v. Hennah*, 19 Ves. 71; *Cochran v. Graham*, 19 Ves. 66.

4. The difficulty which Lord Rosslyn, in the principal case, considered as amounting to impossibility, and which Lord Nottingham had, long before, held to be a most objectionable agreement, (*Coke v. Bishop*, 3 Swanst. 401, n.) namely, that of making every specific item of personalty, to be subsequently acquired by the settlor, the subject of settlement, occurred in *Lewis v. Madocks*, 8 Ves. 157; but Lord Eldon observed, that although it might be difficult to execute such a covenant as to some particulars, that was no reason why it should not be executed as far as possible: his Lordship, indeed, has repeatedly declared, that the difficulty attending an application is no objection to its being entertained by a Court of Equity. *Turner v. Morgan*, 8 Ves. 145; *Earl of Radnor v. Shafloe*, 11 Ves. 454; *Gaskell v. Harman*, 11 Ves. 503; *Waters v. Taylor*, 15 Ves. 24; *Attorney General v. Fowler*, 15 Ves. 88; *Adley v. The Whitstable Company*, 19 Ves. 310. To the same effect is the decision in *Fearon v. Webb*, 14 Ves. 26, where it was laid down, that it is contrary to the course of authorities to omit putting a construction upon words, though vague and difficult, which call for a construction, *ut res magis valeat*.

LORD CRANSTOWN v. JOHNSTON. [*277]

[ROLLS.—1800, FEB. 25.—ANTE, VOL. III. 170.]

A CREDITOR being decreed to re-convey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into Court.

THIS cause (reported, *ante*, Vol. III. 170), stood for judgment upon the only remaining point, the Defendant's claim of costs. The accounts had been taken under the former decree. The Plaintiff had died since the hearing; and a supplemental bill and bill of revivor had been filed. A sum of 2500*l.* had been paid into Court by the Plaintiff under an order, made the 25th of March, 1793, on obtaining the injunction.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have the same opinion upon the merits of this cause, that I had, when it was originally heard. It is not necessary upon this occasion to repeat the circumstances. The Report of the case is already in print; and the only point remaining to be determined by me is as to the costs; and for that purpose I have read over all the proceedings.

It is insisted, that though the Defendant has failed, yet he is entitled to costs, and to be looked upon as a mortgagee. Without going again into the merits of the cause, it is enough to state, that it appears to be shortly this: that this Defendant, after having been delayed for a debt due from the Plaintiff for many years, found out at last, that he had a remedy by proceeding against the Plaintiff's estate in the Island of St. Christopher; and that by proceeding according to the rules of the Island, there was a mode, by which the estate might be brought to sale without any knowledge of the Plaintiff of such a proceeding going forward (1). By the rules of the Island,

(1) Stat. 5 Geo. II. c. 7.

as I am now to understand it, though I cannot think, if the Courts of the Island had been applied to, it would have been permitted, if the Defendant is not resident in the Island, and has no attorney in the Island, service of notice at the last place of abode, or fixed upon the freehold, is sufficient for the purpose of bringing the estate to sale. The Plaintiff was a reversioner after the life estate of his mother. Therefore no notice there given could possibly operate as a notice to him. It might as well have been in any other Island, or upon the Royal Exchange in London. However, the Plaintiff in that action thought fit to resort to that law. It must never [* 278] be forgot, that the only object of that law is, that *Plaintiffs may enforce payment of their debts; and that is the mode chalked out for that purpose; and the mode is such, that I can hardly conceive, if the Courts of the Island were applied to, it would be permitted to go to this extent by bringing the estate to sale, without any particular, or any inquiry into the incumbrances affecting it. It is perfectly clear, that the Defendant resorting to this law proceeded to a sale of the estate, not with an object of getting payment of his debt; for, if so, I think he was perfectly justified in that: but it is clear, it was not with that view, but in order to make himself master of the estate. That is an object not legitimate: nor such as any creditor should in any Court be permitted to effect.

At the sale, that took place under that proceeding before the Provost Marshal, the Defendant was the only purchaser; as may be supposed. It is not to be denied, that this Plaintiff had an object to delay the Defendant as to the payment of his debt. It is clear, he had notice, that proceedings were instituted in the Island: but he had not an idea, that it was possible for the Defendant to carry that proceeding to the effect, to which it has been carried. Therefore he rested without making that tender, which, I think, he ought to have made. Some time before it came to his knowledge, what the effect of the sale actually was, but after he had notice of the proceedings, applications were made, that the Defendant would forbear to use it for the purpose of holding the estate, and be content with his principal and interest. That he refused: and many reasons are given, that it was right, and not unconscionable in him. Those applications having failed, the bill was filed. Upon the answer coming in a motion was made for an injunction to restrain the Defendant from proceeding to take possession. Upon looking very minutely into all the proceedings it appears to me, that after that injunction was granted, it was the business of the Defendant to have acquiesced, and accepted the money paid into Court. He thought fit to do otherwise. The cause has proceeded in a very expensive manner. A commission went to the Island to examine witnesses to all the particulars. When the cause came to a hearing, I was, as I am now, clearly of opinion, that it was contrary to justice, that this proceeding should be made use of for any other purpose than the Act of Parliament intended; namely, that parties having

constructive notice should be liable to all the inconvenience resulting from it. Nothing has been done since but taking the accounts. A supplemental bill was filed upon the late Lord Cranstown's death: and now it is insisted, that the Defendant is entitled to all the costs. At first I thought, as the money paid into Court might have been sufficient to pay him, he might have been entitled to all the costs. But upon looking into it I think, it was not a proper defence for him to make; and he ought to have accepted the money tendered to him; after which there was no farther trifling upon the part of the Plaintiff; and it is too much in a Court of justice, thinking the Defendant was not right in the defence he made, to give him his costs; and it is not proper, that the Plaintiff should be charged with all the costs.

The decree directed a reference to the Master to tax the Defendant his costs of the original cause from the time the bill was filed to the time the money was paid into Court by the Plaintiff under the order, made the 25th of March, 1793, and also his costs of the cause subsequent to the hearing; also the costs of all parties upon the supplemental bill and bill of revivor; to be paid by sale of so much of the Bank Annuities as will be sufficient for that purpose: but as to the costs of the original cause from the time of paying the money into Court and the hearing no costs were given on either side. The Master was directed to compute subsequent interest upon the sum reported due to the Defendant; and it was directed, that the same with such interest should be paid to the Defendant upon his executing a reconveyance to Lord Cranstown, the Defendant in the supplemental cause, of all the interest obtained under the sale by the Provost Marshal of the Island of St. Christopher's, without prejudice to any other interest the Defendant Johnston may have in the premises (1). The residue of the money arising from the sale of the Bank Annuities was directed to be paid to the executors of the late Lord Cranstown.

SEE, *ante*, the notes to S. C. 3 V. 170.

(1) This was upon a suggestion that he had a paramount mortgage.

BEAUCHAMP v. THE EARL OF HARDWICKE.

[1800, FEB. 26.]

CONSTRUCTION of several testamentary papers; that some revoked others: probate having been granted of all. (a)

The Lord Chancellor of opinion, that it is expedient to apply the provisions of the Statute of Frauds as to devises to wills of personal estate, [p. 285.]

THE Ecclesiastical Court granted probate of five testamentary papers, marked A. B. C. D. E., as the last will of Lætitia Beauchamp Proctor, deceased.

The paper marked A., was as follows: the passages between inverted commas being copied *verbatim*:

"This is the last will and testament of me Lætitia Beauchamp Proctor of Upper Grosvenor Street," &c. The testatrix then gave several specific legacies of pictures, drawings, books, and prints, and some pecuniary legacies for mourning; and reciting, that she had a number of other trinkets, that would not fetch much, if sold, she desired, they might be equally divided between her two sons William Henry Beauchamp and Christopher Beauchamp, excepting jewels of every kind, and all valuables, such as medals, the gold stone, &c. "In this I trust to the discretion of my sister Agneta York. And as to all the rest and residue of my personal estate of what nature or kind soever I give and bequeath it in trust to the Earl of Hardwicke, the Honourable John Eliot, and Charles Yorke, Esq. and the survivor of them, and the executors and administrators of such survivor, to be by them converted into money and laid out in Government or real securities to the best advantage in their names, upon trust to pay over and apply the interest, dividends and produce, of the same to the use and benefit of my said sons William and Christopher Beauchamp and their assigns in equal moieties during the term of their natural lives: their respective receipts for the same from time to time being a sufficient discharge to the said trustees; and after the decease of my said two sons William and Christopher or either of them then to pay and apply the interest, dividends and produce, aforesaid, unto and towards the maintenance and education of the children they may leave respectively, until they shall attain their age of twenty-one, or be married, by equal moieties: that is to say, the moiety of the said William after his decease to go and be applied to and for the use of his children in equal shares; and the moiety of the said Christopher after his decease to go and

[* 281] be *applied to and for the use of his children if any in equal shares; and in case either of my said sons William and Christopher shall happen to die, leaving no children, my will is,

(a) The Ecclesiastical Courts do not confine the testamentary disposition to a single instrument: but they will consider several, of different natures and forms, as constituting altogether the will of the deceased. *Sandford v. Vaughan*, 1 Phillim. 39, 128; *Harley v. Bagshaw*, 2 Phillim. 48; *Masterman v. Maberley*, 2 Hagg. 235; 1 Williams, Executors, (2d Am. ed.) 61.

that the said trustees shall pay and apply the interest, dividends, and produce, of the moiety of my said son dying without children to the use and benefit of my other son during his natural life, and after his decease to the use and benefit of his children; and that after the decease of both my sons, and when and so soon as all the children they may respectively leave shall attain their ages of twenty-one, or be married, the said trustees shall transfer and divide the principal moneys and capital intrusted to them unto and among the said children, equally, share and share alike: the portions of each child to be paid and transferred to him or her on attaining the age of twenty-one years or being married; and in case both my said sons William and Christopher shall happen to die, leaving no issue or lineal descendants living at the time of their death, I bequeath the trust moneys to my nephew Charles Yorke, Esq. to his sole use and disposal."

She then gave some directions as to her funeral; and proceeded thus:

"I appoint my sister Agneta Yorke, the Honorable John Eliot, Charles Yorke Esq. and Christopher Beauchamp Esq. my executors." Then, after some farther directions to her executors, "And this is my last will and testament: in witness whereof I the said Lætitia Beauchamp Proctor the testator have to this my last will and testament set my hand and seal this"

"Signed sealed published and declared by the said Lætitia Beauchamp Proctor the testator as and for her last will and testament in the presence of us who have subscribed our names as witnesses in her presence and in the presence of each other."

This paper was neither signed by the testatrix, nor by any witness: nor was it dated. It was all written by the testatrix, except in the appointment of executors the words "and Christopher Beauchamp Esq.;" which were interlined in a different hand.

*The paper, marked B., written also by the testatrix, [*282] began thus:

"After having made some bequests this to follow as to all rest and residue of my personal estate of what nature or kind soever I give and bequeath it q̄. in trust to (two or more trustees) and the survivor of them and the executors and administrators of such survivor, to be by them converted into money and laid out in Government or real securities to the best advantage in their names q̄. upon trust."

The paper then followed the former almost *verbatim* down to the provision in case of the death of both her sons, leaving no issue; where it concluded thus:

"And in case both my said sons William and Christopher shall happen to die leaving no issue or lineal descendants living at the time of their death, my will is, &c. &c. (here I am to direct how the trust money shall be disposed of in case my two sons leave no heirs)"

The paper, marked C., was written also by the testatrix, upon the last side of the second sheet, upon which the paper marked B., was written, under that writing; as follows:

"I revoke as far back as this my last will and testament and give"

The paper, marked D., followed upon the same paper, immediately after the above words. This, except the signature, was not written by the testatrix:

"I revoke as far back as this my last will and testament and give to my son William Henry and Christopher Beauchamp all my money the residue of my personal estate of whatever kind soever I give and bequeath it to in trust and the survivor of them and the executors and administrators of such survivor to be by them converted into money and laid out in Government securities or real securities to the best advantage in their names upon trust to pay for the use and benefit of my sons for the use and benefit of my sons William Henry and Christopher and their assigns in equal moieties."

Then followed in the testatrix's had "Witness January 11 L. Beauchamp Proctor:" then in different hands "In presence of Richard Carnes: Isabella Braddock."

[* 283] The paper, marked E., all written by the testatrix, was as follows:

"Upper Grosvenor Street March 7 1797 Codicil Whereas I have given and advanced several sums of money to my son William Henry Beauchamp and whereas I have also paid for many articles for my said son and it being always my intention to make no difference betwixt my two sons in money matters I desire my executors will pay to my son Christopher Beauchamp to his own separate use the same sums as I have in any way expended upon my son William Henry Beauchamp at the time of and since his marriage to the time of my death I except the first 100*l*. because I advanced the same sum of money to my son Christopher Beauchamp when he went to Queen's College Cambridge and as it is most likely he may be the only one of my family near me at the time of my death. I also appoint the said Christopher Beauchamp one of my executors to my last will and to this codicil begging he will in every thing be directed by my other executors L. Beauchamp Proctor."

The testatrix died upon the 12th of January, 1798. The bill was filed by her two sons, claiming the residue absolutely, subject to the payments directed by the paper marked E. William Henry Beauchamp had four sons, who were Defendants.

Richard Carnes, the apothecary, who attended the testatrix, and one of the subscribing witnesses to the paper marked D., being examined by the Plaintiffs stated, that he was present with the testatrix, as was also her servant Isabella Braddock, upon the evening of the 11th of January, 1798. About half past 11 o'clock she desired Isabella Braddock to raise her up in her bed, and give her her spectacles and pen and ink; as she wished to alter and sign her will; and she then desired her son Christopher to look for her will in a box

standing by the bed, and to give her the same. He opened the box; and among other papers therein found the papers marked A. and B., tied up together. He gave them to the deceased; who opened them; and after having read over the paper, marked A., said to her son, that she had tied him up, and that she wished to undo it; or to that effect; by which the deponent understood, that she had by her will tied up part of her estate and effects from the possession * of her said son; which she wished to alter. She [* 284] then began to write the paper marked C: but finding herself unable from her weak state of body to write her intended alteration as to the disposition of the residue she desired Christopher Beauchamp to write what she would dictate to him. Whereupon from her dictation he wrote the paper, marked D., to the end of the passage, concluding with the words "and their assigns in equal moieties." She then desired her son to read over to her what he had written; which he did in the presence of the deponent and Isabella Braddock; and then addressing herself to the deponent she said, "You understand what I mean to do." He answered "Yes." She then desired her son to read over to her the whole of the paper, marked A; which he did; and when he came to the appointment of executors, and had read the name of Charles Yorke Esq., she then said "and Christopher Beauchamp Esq.;" and desired him to insert his own name as one of the executors thereof; which he in the presence of the deponent and Isabella Braddock did. When he came to the end of that paper, he then read in addition thereto the paper, marked D., written by him, as before mentioned; and when he had finished reading over the said papers, she then again asked for a pen; and said, "Now I will sign it;" and she then wrote the words "Witness January 11;" and subscribed her name at the end of the paper, marked D.; and the deponent and Isabella Braddock severally subscribed their names as witnesses thereto. When they had subscribed their names, she desired her son to tie up all the papers and put them in the box again, and lock them up; and she then said, "I shall lay down in peace now I have done this," or to that effect.

The deponent upon his cross-examination stated, that the testatrix expressed some disapprobation at the manner, in which the residue of her estate was so disposed of by her said will; and from her conversation at the time of reading her will he verily believes she did intend to revoke so much of her will as related to the disposition of the residue; and intended to dispose of the said residue according to the paper marked D.

The effect of these papers was submitted to the Lord CHANCELLOR without argument.

Lord CHANCELLOR [LOUGHBOROUGH]. Surely the [285] Ecclesiastical Court cannot prove all these papers. They must reject either what revokes or what is revoked. If the will is revoked, they should only have proved the paper revoking it and what is subsequent to that. If it is not revoked, they should not

have proved the paper purporting to revoke it. It turns also upon evidence of the demeanor of the testatrix at the time. It is not a question for me to determine. They should have desired the Ecclesiastical Court to determine, which of these instruments is the last will and testament. The paper marked B. appears to be a mere draft, interlined and scratched. I should incline to think, (it is a rash and hasty stroke) the will is to stand as to the specific residue: as to the disposition of the general residue the codicil giving the absolute interest to the sons controls it. There could be no purpose for making the codicil, unless she meant that. My embarrassment is, that I am acting as a Court of probate.

The *Solicitor General*, [Sir William Grant], for the Plaintiffs observed, that it appeared most likely, the paper, marked B., was the first written paper, from the circumstance, that the trustees were named in the other.

The *Attorney General*, [Sir John Mitford], for the Defendants said, all the papers were testamentary; therefore probate of all was granted; and the construction left to the Court: that this was very much the case of *The Duke of St. Albans v. Beauclerk* (1), and *Reay v. Hopper* (2), and *Coote v. Boyd* (3), in which probate was granted of both instruments; though the latter operated in part as a revocation of the former. The paper, marked D. was probably written in such a way from the delicacy of Mr. Beauchamp; who probably put down every word the testatrix said.

LORD CHANCELLOR. If you take it with the evidence, it is very clear, what was her intention; thus far to revoke: then she does not mean to revoke the rest; for she desires her son to add himself as executor; and really there was no use for this but to give them the absolute interest. It is really very unfortunate, that there is no solemnity necessary for wills of personal estate (4). The [*286] *idea, that always struck me, as the wisest, is to make exactly the same provisions necessary for personal estate as for real; and then all the constructions, that have been made upon the Statute of Frauds (5) would apply to it (a).

I think I may safely enough pronounce, that the disposition of the residue by the will is revoked by the testamentary paper, marked D. Direct the account *pro forma*; and that an equal sum to what the testatrix had advanced for her son William Henry shall be paid to the Plaintiff Christopher Beauchamp, according to the paper, mark-

(1) 2 Atk. 636.

(2) At the Rolls, Michaelmas, 1785; cited 2 Bro. C. C. 526, in *Coote v. Boyd*.

(3) 2 Bro. C. C. 521.

(4) See the opinion expressed by the Lord Chancellor, of the necessity of legislative interference for this purpose, *ante*, vol. iv. 208, in *Mathews v. Warner*, and by the Master of the Rolls, iii. 160, in *Coxe v. Bassett*.

(5) 29 Char. II. c. 3.

(a) The provisions of 1 Victoria, ch. 26, § 9, conform with these suggestions. So also the Law of Massachusetts. Rev. Stat. of Mass. ch. 62, § 6. See a full note of this subject, *Ellis v. Smith*, *ante*, 1 V. 11, note (a); *Coxe v. Bassett*, 3 ib. 160, note (a).

ed E. ; and that the residue shall be paid over to the Plaintiffs in equal moieties.

SEE note 1 to *Cox v. Bassel*, 3 V. 155.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir ARCHIBALD MACDONALD, Knt., Ch. Baron.
Sir BEAUMONT HOTHAM, Knt., Sir RICHARD PERRYN, Knt.,
Sir ALEXANDER THOMPSON, Knt., Barons.

GRAY v. MATHIAS.

[JUDGMENT.—1800, FEB. 28.]

VOLUNTARY bond during cohabitation to a woman, previously of a very loose life: soon afterwards another bond, expressly securing a continuance of the connection by an annuity in case of separation. Bill by the executor to have the bonds delivered up was dismissed with costs: the former being considered unimpeached: (a) the latter void at law, as *pro turpi causa*. (b)

WILLIAM JAMISON Esq. cohabited with the Defendant Jane Mathias from the year 1793 till his death in September, 1797. On the 14th of April, 1796, he executed a bond to her in the penal sum of 700*l.* ; with a condition, that if the heirs, executors, or administrators, of the said William Jamison shall pay the said Jane Mathias, her executors, administrators, or assigns, the sum of 350*l.* within six months after his decease, with interest from the day of his death, then the obligation should be void.

On the 6th of September, 1796, he executed another bond to her in the penal sum of 1000*l.* ; with a condition, reciting the past connection ; and that the above bounden William Jamison from the affection, which he hath and beareth for and towards the said * Jane Mathias, and for and towards her future maintenance and support in case of his death before her, or of

[* 287]

(a) Chitty, Cont. (6th Am. ed.) 661, 662 ; *Shenk v. Mingle*, 13 Serg. & Rawle, 29 ; *Cusack v. White*, 2 Rep. Con. Ct. 284, 285 ; *Nye v. Mosely*, 6 Barn. & Cres. 133 ; *Friend v. Harrison*, 2 Carr & Payne, 584.

(b) 1 Story, Eq. Jur. § 296, 299 ; *Winnebriner v. Weisiger*, 3 Monro, 35 ; *Fro-ringer v. M'Burney*, 5 Cowen, 253. See *Curtis v. Greenwood*, 6 Mass. 379 ; *Coutts v. Greenhow*, 2 Munf. 363. There is no jurisdiction in Equity to order a legal instrument to be delivered up, on the ground of illegality, which appears upon the face of the instrument itself. *Simpson v. Lord Howden*, 3 My. & Craig, 97 ; S. C. 1 Keen, 583 ; 2 Story, Eq. Jur. § 700 a-702 ; *Ryan v. Mackmath* 3 Bro. C. C. (Am. ed. 1844.), 15, 18, and notes ; *Piersall v. Elliott*, 6 Peters, 95, 98-100. But see *Hamilton v. Cummings*, 1 Johns. Ch. 517 ; *Jones v. Perry*, 10 Yerger, 59.

his declining to cohabit and live with her, hath agreed to settle and secure to her the annuity or yearly sum of 60*l.*, payable, as after-mentioned: now the condition is such that in case the said William Jamison shall decline to live and cohabit with, and support, the said Jane Mathias, and shall separate and part from her, then the above-bound William Jamison, his heirs, executors, or administrators, any or either of them, shall and will well and truly pay or cause to be paid unto the above-named Jane Mathias and her assigns one annuity or yearly sum of 60*l.*, payable half-yearly during the natural life of the said Jane Mathias upon the 21st of December and the 24th of June, the first payment thereof to be made upon such of the above-named days as shall first happen after such separation and living apart; but in case the said William Jamison shall continue to live and cohabit with the said Jane Mathias to the time of his death, then if the heirs, executors, or administrators of the said William Jamison, &c. shall pay, &c. to her or her assigns one annuity of 60*l.*, &c. during her life, then the obligation shall be void.

Mr. Jamison died possessed of very considerable property, to the amount of about 30,000*l.*; which he bequeathed in favor of his infant daughter by a deceased wife; with a limitation over in case of her decease under the age of twenty-one to the Plaintiff; whom he appointed executor and guardian to his daughter.

The bill prayed, that the Defendant may be decreed to deliver up the bonds; or that the latter bond may be declared to have been given in lieu and satisfaction of the former; and for an injunction.

An injunction was granted as to both bonds by the Court of Exchequer upon motion; after a verdict had been obtained in favor of the first bond.

At the time of the execution of these bonds Mr. Jamison was about forty years of age. There was contradictory evidence as to his being a man of weak understanding, and given to excessive drinking: but the proof of intoxication did not apply to the execution of the bonds; which took place in the presence of the attorney, who drew them; and he was the witness to them. The evidence was also contradictory upon the fact, whether these trans-
[* 288] actions *were voluntary acts or in consequence of her pressing him. The Plaintiff also produced evidence, that the Defendant had been a very loose woman, before she lived with Mr. Jamison; and that he said, he had given her a bond for 60*l.* a year; and he thought he had done very handsome.

The daughter of Mr. Jamison died under the age of twenty-one, after the suit had been instituted.

(1) Mr. *Plumer* and Mr. *Fonblanque*, for the Plaintiff. If the transaction was entered into *pro turpi causa*, and is against public policy, it is void at law: but this Court has a concurrent jurisdiction.

(1) The arguments *ex relatione*.

The consideration for future cohabitation appears upon the face of one of these bonds; and the first bond must fall with the other; as the same connection subsisted. *Whaley v. Norton* (1). *Priest v. Parrot* (2). *Turner v. Vaughan* (3). To make it good it must appear, the cohabitation was to cease. *Hall v. Elliot*, in the Court of Exchequer. In point of conscience the Defendant's claim is not available. The motives for instituting the suit will not weigh; but the daughter was living, when the bill was filed. The law must take its course. The principle is to repress vice by taking away the temptation: to protect individuals against the influence, which artful women may acquire through the medium of the passions. Most of the cases may be referred to one of these heads: a stipulation for chastity: a stipulation for cohabitation with a prostitute: in which cases the law interposes: 3dly, Where she is reformed, and the connection at an end; in which case the man may exercise his bounty. As to the merits of this case, the second bond is flagrantly infamous. It is exactly the case of *Walker v. Perkins* (4); to induce a continuance of the connection. All the cases, that can be cited for the Defendant, are, where the security was given for past consideration. The Court has been induced to relieve in some cases upon grounds of compassion; as, where there has been a child. If the second bond is bad, so is the first, in prosecution of the same purpose, given by the same person to the same person, an artful woman, at her importunity; she sending for the attorney; and the commerce continuing to the last moment of *his life. The [*289] late case of *Franco v. Bolton* (5) was after a verdict at law.

It was necessary for the executor to come here, that he may know how to conduct himself. The Court will not leave him in suspense, and to administer at his peril. The only difference, where the objection appears upon the face of the instrument is, that there is no danger of losing evidence: but that is not the ground of the jurisdiction. It is much broader.

Mr. *Richards*, Mr. *Hart*, and Mr. *Cox*, for the Defendant. The existence of this woman as a valuable member of society depends upon the decision of this cause. It is a great impropriety in a man, *particeps criminis* at least, or the greater sinner, to come into Equity. The decision in *Franco v. Bolton* tends more than all the others to restore the true course of justice. Mr. *Jamison* was not an old man. He was possessed of a very large property; which in the event has come to this Plaintiff. The motive of the suit is apparent; to deprive this poor creature of this little pittance. All grounds from infirmity of mind are given up. The evidence proves directly the contrary. Though her unfortunate situation previously to this con

(1) 1 Vern. 483.

(2) 2 Ves. 160.

(3) 2 Wils. 339.

(4) 3 Bur. 1568.

(5) *Ante*, vol. iii. 368.

nection is admitted, it is proved, that afterwards she had no connection with any one else. The last house she lived in was respectable. It is proved, she there lived faithfully with this gentleman until his death; and there is merit in her having lived in an exemplary manner in such a house as she lived in before. There is great danger in too much rigor, and in holding, that a poor creature on account of her unfortunate situation shall not have justice. She was comparatively reclaimed by this connection. There is no case, or even *dictum*, that if a man lives with a woman, and gives her a bond or security, that security is therefore void. There is no improper condition whatsoever in the first bond. Shall a man be permitted to come here, desiring to have back again a bond, which yesterday he gave, thinking it meritorious? What is there against the second bond? Is 60*l.* a-year for life too great a provision by a rich man for a woman, whom he has rescued from prostitution, and with whom he has lived for such a period? Is such a transaction one, against which a Court of Equity will relieve? Can the Court from [*290] the very circumstance of their living *together, assume an improper influence, or upon any other ground declare this security void? Some of the positions must be admitted; viz. if a rash young man is induced to give a bond to a woman living as a strumpet, for whom there is no sort of reason that he should make a provision: but it is a very different case, where the woman is comparatively reclaimed; and lives faithfully and affectionately afterwards. All the authorities are clear against setting aside the provision in such a case. There is no instance of relief, where the connexion had continued for a length of time, the man *sui juris*, and the woman faithful, unless, where it is the price of future prostitution; though it must be postponed to debts.

The case of *Bodly v.* — (1) before Lord Nottingham, cannot be got rid of. In *Matthew v. Hanbury* (2) relief was given upon imbecility. The Defendant insisted also upon a false defence. Having insisted upon a valuable consideration, she could not aver, that the deed was voluntary. It is said, an executor is to be looked upon in a different light from the party himself. That is only, where he wants assets: where there are assets, the executor is in the same situation. *The Marchioness of Annandale v. Harris* (3) and *Cray v. Rooke* (4) are upon the same principle with all the other cases. This Defendant does not come for relief; but is brought here. She is as much entitled to favor as in *Cray v. Rooke*. *Clarke v. Periam* (5) went upon the evidence. It did not appear, but that the woman was a common strumpet. There also she set up a valuable consideration; and could not afterwards insist upon the bond as voluntary. In *Priest v. Parrot* a woman coming into a family, where there

(1) 2 Ch. Ca. 15.

(2) 2 Vern. 187.

(3) 2 P. Wms. 432.

(4) For. 153.

(5) 3 Atk. 333, 337.

were a master and mistress, becomes an adulteress, and causes a separation. That was a monstrous case: but Lord Hardwicke intimated, that had she not known him to be a married man, or, if she had been imposed upon, it might be otherwise. In *Turner v. Vaughan* the Judges supported the bond; and the Court will act upon that case; for this is, after all, matter of law. *Hill v. Spencer* (1) runs *quatuor pedibus* with this case; except that in that the Defendant was proved not to have been faithful: in this no infidelity is proved. What must have been the influence of the Defendant in that case, when Hill offered her 1000*l*.? In *Walker v. Perkins* it was clearly the price of prostitution. It is *said, [*291] *Franco v. Bolton* was after a verdict at law: but that amounts to nothing; for if a Defendant fails at law against a corrupt instrument, he may afterwards come into Equity. It is the common practice to relieve after a verdict at law, and to enjoin execution. In this case they might have pleaded at law. If there is any thing in the circumstance of a verdict, this Defendant has a verdict upon the first bond; and would have had a verdict upon the other: but they prevented it by paying the annuity. This is quite a legal question; though undoubtedly this Court may sometimes be resorted to. It has been said very correctly, that a Court of Equity is not to be made an engine in such transactions. *Dillon v. Jones* (2) is much like this case. The woman had lived with many persons. She met Mr. Dillon at the Opera. They lived with the greatest attachment; and it was apparent, she had great influence over him. He gave her a bond for 3000*l*. and an annuity. She was asked, whether those securities were given as the price of prostitution. She said, no: no condition of that kind was coupled with it; adding, "but perhaps he might mean to attach me." They quarrelled; and then she levied an execution. Lord Bathurst would not interfere, but upon the terms, that the Plaintiff should pay the amount of the bond into Court, and the Sheriff should pay her the money levied in respect of the annuity. It was afterwards compromised: the Plaintiff's father granting a smaller annuity. It is plain from the terms imposed, what must have been Lord Bathurst's opinion. It is said, this Defendant had importuned for a provision. Was there any harm in that? Was it not reasonable? Where was she to go upon his death? If this is an illegal bond, why should the Plaintiff come here, if it is void at law? The only ground, upon which they are right here, must be, that the testator was unduly influenced: but there is no evidence of that.

Mr. Plumer, in reply. As to the question of jurisdiction, upon the objection arising on the face of the instrument, it is equally within the determination of a Court of Equity. This point was made upon the motion for the injunction: but it was granted as to both bonds. Whatever a Court of Law will do, it cannot oust the

(1) Amb. 641.

(2) In Chancery, before Lord Bathurst.

jurisdiction of Courts of Equity in these cases. This is considered as a bond obtained by fraud. No matter, how the consideration *is proved. It is like the cases of marriage brocage bonds, &c. The Court will interfere, wherever it is contrary to the policy of the law; and will not permit the Defendant to hold the instrument in order to harass the Plaintiff. *Harrington v. Du Chatel* (1) was decided upon the principle, that the bond was against the policy of the law: the objection, I admit, not appearing on the face of it. *Law v. Law* (2). *Whittingham v. Thornburgh* (3). In *Channel v. Churchman* (4) notes given to carry on a tithe suit were decreed to be delivered up, though there was a defence at law. The same point, that there is a concurrent jurisdiction, was decided in *Minshaw v. Jordan*, at the Rolls, *De Costa v. Scandret* (5), *Sowerby v. Warder* (6), *Rawden v. Shadwell* (7), and *Newman v. Franco* (8), as to money won at play. *Brodie v. —* in the Court of Exchequer, upon a note taken on the day of the dissolution of partnership with notice. *Clarke v. Periam*. Specific relief is given in Equity; which cannot be had elsewhere. No case has been cited, where there was an express stipulation, that the parties should live together: what Lord Mansfield in *Walker v. Perkins* with indignation call *premium prostitutionis*: in *Franco v. Bolton* there were particular circumstances. It was after a verdict at law. It is said, there is a defence at law: but as to the first bond at least the Plaintiff has a right to call upon the Defendant to say, what was the consideration. We could not have insisted at law, that the second bond was in lieu of the first. Besides the executor must come here to have this bond postponed to other creditors.

To sustain such securities the cohabitation must be past. The imbecility of this man is plain from his conduct. There is evidence of conversations, showing, that at one period he intended marriage. What Lord Nottingham says in *Bodly v. —* seems odd; for till lately Courts of Law would not permit an averment *dehors* the instrument; as now they do. *Collins v. Blantern* (9) is the first case. *Whaley v. Norton* shows the difference as to a voluntary bond given to a prostitute, and between contracts executed and executory. [* 293] **Matthew v. Hanbury* shows the distinction between the case of the party himself and the executor. In *Bainham v. Manning* (10) it is stated, that *Matthew v. Hanbury* was decided upon the ground, that the man had been prevailed on

(1) 1 Bro. C. C. 124.

(2) For. 140; 3 P. Wms. 391.

(3) 2 Vern. 206.

(4) In the Court of Exchequer in 1776.

(5) 2 P. Wms. 170.

(6) Cited 2 Anst. 456, 7.

(7) Amb. 269.

(8) 2 Anst. 519.

(9) 2 Wils. 341; see, *ante*, vol. iii. 371, in *Franco v. Bolton*, and the note, 371

(10) 2 Vern. 242.

by the insinuations of a common prostitute. In *Lightbone v. Weedon* (1) there was no proof of *turpis contractus*. In *Spicer v. Hayward* (2) relief was denied: but the man had seduced his wife's sister; and had children by her. In *The Marchioness of Annandale v. Harris* the Court would not have resorted to special arguments, if it could have been argued on the general ground. *Cray v. Rooke* was treated as a mere voluntary gift: a woman of virtue induced by large promises. *Clarke v. Periam* only shows, that Lord Hardwicke thought, the charge, that the Plaintiff was a woman of bad character, was material. It was proved, that she was a strumpet. Circumstances will induce the Court to relieve against bonds given as *premium pudoris*. In *Turner v. Vaughan* the bond was for cohabitation had. Strong expressions fell from the Judges as to the duty of providing for a woman, with whom the party has cohabited. There was nothing to show, she had been a strumpet. That case therefore is reconcilable with the others. It must have been decided upon the ground, that it was *premium pudoris*; which Gould, Justice, says must be presumed. In *Hill v. Spencer* there was no stipulation for the future; and there was an act of generosity in the Defendant, refusing the 1000*l*.

Feb. 18th. MACDONALD, Chief Baron, stated the case and delivered the opinion of the Court.

The principles, upon which cases of this sort are to be decided, are now so well settled, and so extremely clear, that I think myself dispensed from the necessity of going through all the cases. The case in short is this. In the course of cohabitation the first bond was given: a simple voluntary bond. In the course of the same cohabitation the second bond was given: which upon the face of it states a continuance of the cohabitation: and makes it the interest of one of the parties, and no matter which, that that connection should be discontinued. As to the first bond, it is most clearly settled, in cases, where it has not been the direct point, and in cases where it has, as for instance, in *Dillon v. Jones*, where it * was made a question, whether there was any understand- [* 294] ing for a continuance of the connection in the breasts of the parties, though it was not expressed; and the Defendant being interrogated, said, there was not; and therefore it was held good, though only voluntary. In *Hill v. Spencer* that is most clearly laid down; and Lord Camden said, there is little difference between such a bond to a person in this unhappy situation and giving a sum of money.

As to the second bond it is equally clear, that where this sort of consideration appears upon the face of the instrument, it cannot be countenanced in a Court of Equity; to set aside all considerations of religion and morality, for an obvious reason of public policy: all

(1) 1 Eq. Ca. Ab. 24.

(2) Pre. Ch. 114.

proper connection can arise only in the honorable state of marriage. It is said, the Plaintiff brings this bill rather as guardian to the daughter than on his own account. How far he was right in not smothering this transaction for her father's sake, it is not for me to say. He thinks it for his character to hang up his benefactor by the road side, with all his infirmities about him. He comes with no very favorable claim to the interposition of this Court. But he comes in a case desperate with regard to the first bond; for nothing is proved or shown, that can in the least invalidate that as a voluntary bond. Therefore as to that the bill must be dismissed with costs (1).

With regard to the second bond, without entering at all into the question of jurisdiction, it turns upon a plain point. The Plaintiff comes upon a bond declaring upon the face of it, that it is an invalid bond. The Defendant should have demurred to the action upon that bond. Instead of that he comes here; professing, that it is a piece of waste paper: he goes through the whole length of equitable litigation, bill, answer, commission, &c. at an expense possibly of 2 or 300*l*. In such a case, though Equity may have a concurrent jurisdiction, it is not fitting in the particular case, that Equity should entertain the suit: for it would be a monstrous hardship, if a man should come here, saying, another person has an instrument good for nothing upon the face of it, that there is nothing of discovery wanting, but stating, that if the instrument is ever produced, it is good for nothing, and a piece of waste paper, yet seeking by a long litigation in this Court to have that instrument delivered up. That is a case not to be encouraged; for the Plaintiff himself states, he has an irrefragable defence against it. Therefore upon that [* 295] ground that *part of the bill also, that is, the whole of the bill, must be dismissed with costs (2).

SEE note 2 to *Franco v. Bolton*, 3 V. 368.

SMITH, *Ex parte*.

[1800, MARCH 1.]

A SEPARATE commission of bankruptcy established; though the other partner died before the assignment.

In the case of a debt due to the Crown by a bankrupt the Crown will seize, if they can, before assignment, [p. 297.]

THE petitioners, who were bankers were creditors of Edward Strickland and Robert Richardson, partners, to the amount of 2000*l*. for money paid and advanced. Strickland and Richardson having

(1) *Knye v. Moore*, 1 Sim. & Stu. 61; *Binnington v. Wallis*, 4 Barn. & Ald. 650.

(2) In *Hayward v. Dimesdale*, *post*, vol. xvii. 111, Lord Eldon maintained the equitable jurisdiction in such a case. See the note, *ante*, iii. 371.

stopped payment, the latter absented himself; and committed an act of bankruptcy: but Strickland had not committed any act of bankruptcy; being confined to his bed in a dangerous state. Under these circumstances the petitioners on the 1st of February struck a docket, and bespoke a commission of bankruptcy against Richardson; and upon the 8th the commission was sealed and issued against him, by the description "Robert Richardson (partner with Edward Strickland) of Corporation Row St. John's Street in the county of Middlesex, merchant, japanner, dealer and chapman, carrying on trade under the firm of Strickland and Richardson."

On the 8th of February the commissioners met; and opened the commission; and qualified; and issued a summons to one of the workmen to attend upon that day, to be examined as to the act of bankruptcy. The summons was served on that day: but the witness was prevented from attending by the clerk of the partnership. The commissioners adjourned; and issued other summonses, particularly to the foreman, to attend upon the 14th. He did not attend: but upon the 15th the commissioners upon other proof found Richardson a bankrupt; and executed a provisional assignment; and the assignee took possession.

On the 14th of February Strickland died. On the same day a docket was struck, and upon the 15th a commission was sealed, against Richardson, on the petition of his brother-in-law, upon a debt of 200*l.* for money lent and goods delivered by the description "Robert Richardson of St. John Street, in the county of Middlesex, japanner, surviving partner of Edward Strickland, late of the same place, japanner, deceased."

The solicitor for the petitioners upon the 15th of [296] February served the solicitor for the second commission with notice of the former: notwithstanding which the second commission was proceeded in; and Richardson was found a bankrupt under that upon the 17th. Both commissions were advertised upon the 18th of February; and meetings for the choice of assignees were appointed in both for the first of March.

Under these circumstances the petition prayed, that the second commission should be superseded.

The *Attorney General* [Sir John Mitford] objected, that the assignment in fact severs the joint-tenancy; and no assignment having been made previous to the death of Strickland, the survivorship took place. The date of the commission has no effect: but the relation to the act of bankruptcy is this: it avoids all acts to the prejudice of the creditors; but has not the effect of preventing the bankrupt from acquiring property by survivorship. The assignment has that effect. From the moment it is executed it has precisely the same effect as a voluntary assignment. *Fox v. Hanbury* (1) determines this. The joint-tenancy was there considered severed, not by the act of bankruptcy, but by the assignment. It has been determined,

that acts done by partners, who had not committed an act of bankruptcy, or by their clerks, are valid, notwithstanding a secret act of bankruptcy by another partner. It very often happens, that one partner carries on business a long time after a secret act of bankruptcy committed by the other: but if this doctrine holds, it will be very injurious both to such partner and the creditors.

Mr. *Mansfield*, and Mr. *Cooke*, in support of the Petition. It is said, the assignment is the essential thing to sever the partnership. How was the law previous to the Statute of George II. (1)? Till then the commissioners distributed the effects. The commission severs the partnership. When the commission issues, the property is out of the bankrupt, and in the commissioners; and the assignees take from the commissioners. This partnership was severed in the life of Strickland by the issuing of the commission. This was the idea entertained in *Fox v. Hanbury*. There was no notion, that the partner, who absconded, and the other, remained joint- [*297] tenants. *The whole reasoning of that case goes upon their being from the bankruptcy a severance of the partnership; and then they were tenants in common.

LORD CHANCELLOR [LOUGHBOROUGH]. I mentioned the point to the Judges; and I think, the majority of them were of opinion, they should not nonsuit in either case, an action of trover, or of *assumpsit*. What is recovered is matter of account between the other partner and the assignees (2). The issuing of the commission does nothing, unless he is found a bankrupt. The adjudication, that he is a bankrupt, is what severs the partnership. The first act is that declaring him a bankrupt: then all the property is out of him; and they make the assignment. In order to divest completely they must make the assignment (a). In the case of a debt due to the Crown the Crown will seize, if they can before the assignment.

I am satisfied, the first commission will do well enough. Let the first commission stand.

1. WITH respect to the equities between solvent partners and the assignees of a partner who has been declared a bankrupt, see, *ante*, notes 3 and 4 to *Hankey v. Garratt*, 1 V. 236, and note 4 to *Lyster v. Dolland*, 1 V. 431.

2. As to the preference given to an extent at the suit of the Crown, when such extent is tested on the same day with the assignment under a commission of bankruptcy, see note 2 to *Rogers v. Mackenzie*, 4 V. 752.

(1) 5 Geo. II. c. 30, s. 36.

(2) *Ante*, *Hankey v. Garratt*, vol. i. 236, and the note, 239; *Taylor v. Fields*, iv. 396; *post*, xv. 559, n.

(a) Story, *Partnership*, § 313, § 314; 3 Kent, (5th ed.) 58, 59; Collyer on Partnership, b. 4, ch. 1. p. 59, (2d Am. ed.)

INGRAM v. MITCHELL.

[1800, FEB. 28; MARCH 1.]

MOTION to amend depositions after publication refused.

THE object of this bill, which was filed by the executors of James Innes, was to obtain the performance of an agreement for the dissolution of the partnership between him and the Defendant Mitchell.

Publication having passed, and copies of the depositions having been delivered, a motion was made, that the cause, should be adjourned for two days, and in the mean time that the Defendant should be at liberty to examine Kenneth Macrae to the 4th interrogatory, and to amend his deposition to the 8th interrogatory.

In support of the motion the affidavit of Macrae, who had been a clerk to the partnership, and continued in that capacity with the Defendant, stated, that having been acquainted with the interrogatories previously to attending to give his evidence, he wrote out his answers to such interrogatories; which he delivered to the examiner at the time of his examination, in order to be reduced into proper form; and the same were not afterwards returned to *him. The depositions were defective, and erroneously [* 298] taken, and different from what the witness intended upon his examination. His answer to the 4th interrogatory was wholly omitted.

The affidavit then stated the answer to the 4th interrogatory, relative to a conversation between the partners as to the dissolution of the partnership. The answer to the 8th interrogatory, as it stood in the deposition, was, that the witness did not know of any alteration in the partnership books, or in the mode of keeping the accounts of the aforesaid business. The amendment, proposed by the motion, was by adding the words "except from the letter-book in the deponent's hand-writing hereinafter mentioned."

The witness had been examined to particular interrogatories, not generally to the whole. Macrae was examined to the 3d, 5th, 8th, and 9th. Another clerk was examined to the 4th. No evidence was given on the part of the Plaintiff.

The *Solicitor General* [Sir William Grant] and Mr. *Holford*, in support of the motion. In many cases this has been permitted after publication: but in this instance there is no danger; as no evidence has been entered into by the Plaintiff. By this mistake no deposition has been taken from this witness as to the 4th interrogatory. The paper left by him with the examiner, containing his answers to the interrogatories, has been lost: but the witness has a copy of it. This has been permitted upon the special ground of accident or

mistake; *Griells v. Gansell* (1); *Sanford v. Paul* (2). In this instance there is manifest mistake. The office copy of the deposition takes no notice whatsoever of the 4th interrogatory; and the witness has preserved a copy of what he delivered to the examiner.

The *Attorney General* [Sir John Mitford] Mr. Mansfield, and Mr. Stanley, against the motion. This is very important. It is a very extraordinary mode of examination to permit the witnesses to come with prepared answers (a). The paper now produced as the answer to the 4th interrogatory is of considerable length. It is very difficult to conceive, such an omission could happen by mistake. It must have occurred to the witness, when his examination was read over to him. This therefore must be an after-thought. It is [* 299] not material, that the *Plaintiff has not examined witnesses. The mischief is just the same. *Sanford v. Paul* is not applicable: the object there not being to give evidence, that had not been given before, but merely to rectify the mistake, that the release was not effective.

The Solicitor General said, it could not be an after-thought; for the Defendant in his answer insists upon the very same matter.

Lord CHANCELLOR [LOUGHBOROUGH]. If it turns out to be a mistake or omission of the examiner, it must certainly be rectified (b): but I must be sure of that in some other way. It is usual for a witness to say to an interrogatory, to which he is directed to be examined, but does not mean to answer, that to this interrogatory he says nothing. Another witness is examined to the 4th interrogatory; and says, to the 4th interrogatory he cannot depose. It is first necessary to be known, whether the examiner was directed to examine this witness to the 4th interrogatory. Let the examiner attend, with the original deposition, and the instructions to examine.

The examiner attending in Court, and being questioned by the Lord Chancellor, declared, he never takes charge of papers brought by the witnesses; that he never pays much attention to such a paper; but thinks it safer to examine upon the interrogatories: particularly in this case: the witness being a very young man, and clerk to the Defendant. He supposed, if the witness brought such a paper, he took it away again. The examination was deliberately read over to him; and he signed it.

LORD CHANCELLOR. I cannot possibly let this in. He answers to the 5th and other interrogatories; and nothing is said about the 4th. All the witnesses appear to have been examined to particular interrogatories, and not to the whole of them generally: the 3d,

(1) 2 P. Will. 640.

(2) 3 Bro C. C. 370; see *Sanford v. Paul*, ante, vol. i. 398, and the note, 400.

(a) And the practice was held irregular by Mr. Justice Story in the trial of *Washburn v. Gould*, respecting Woodworth's patent for a planing machine, before a Jury in the Circuit Court for Massachusetts, May, 1844, in the case of a scientific witness.

(b) See *Bridge v. Bridge*, 6 Sim. 352; *Smithwick v. Smithwick*, 1 Hayes & J. 397; *Wood v. Mann*, 2 Sumner, 316.

5th: then the 8th, and then the 9th. Therefore there must have been particular instructions put pointedly. All the witnesses are not examined upon all the interrogatories. It is impossible to let it in (a).

SEE, *ante*, notes 2 and 3 to *Sandford v. ———*, 1 V. 398.

THE ATTORNEY GENERAL v. BOWYER. [* 300]

[1800, MARCH 5.—ANTE, VOL. III. 714.]

UNDER a devise for founding a new college in the University of Cambridge, to be called Downing College, the Crown having at length granted the application for a charter and license, and the University waiving the account against the heir-at-law, who had been substituted as the trustee, farther back than six years, the Lord Chancellor, doubting his authority to confine it, made the decree accordingly upon the terms of their taking an Act of Parliament to confirm it. A commission was directed to distinguish lands intermixed with those devised to the charity; and a receiver appointed, [p. 300.]

Lands, originally held under old mortgages, passed by a general devise; though no release of the equity of redemption appeared, [p. 300.]

No equity between the heir or devisee and the personal representative to convert property from the state, in which it is found at the death. (See the references in the note (1), p. 304,) [p. 303.]

THIS cause, (reported *ante*, Vol. III. 714) was again brought forward for the purpose of obtaining the directions that had been suspended, when the last decree was pronounced, for an account of the rents and profits and the appointment of a receiver.

Since the decree was made, the application to the Crown for a charter having been renewed was referred to the Privy Council; who made a report, that it was proper the charter should be granted: but they declined specifying the number of Fellows, &c. till the amount of the arrear of the rents and profits should be known. A plan of the College proposed had also been approved by the Master, and a contract for the purchase of a piece of ground in the University of Cambridge.

Under these circumstances the principal direction prayed was an account of the rents and profits against Mr. Whittington and Sir

(a) 1 Smith, Ch. Pr. (Am. ed.) 395, 396; 2 Madd. Ch. Pr. (4th Am. ed.) 414, 415. A party will not be allowed to re-examine a witness whose memory has been refreshed since his examination closed, except as to documentary evidence. *Noel v. Fitzgerald*, 1 Hogan, 135. See *Cockerel v. Cholmley*, 3 Sim. 313.

A motion for liberty for a witness to rectify his deposition after publication, the point appearing not to be mere mistake, and his affidavit not explaining it satisfactorily, was refused with costs. *Kenny v. Dalton*, 2 Moll. 386.

After a witness has been examined in the regular course, there must be something special to justify his re-examination. *Sterry v. Arden*, 1 Johns. Ch. 62; *Gray v. Murray*, 4 Johns. Ch. 412; *Hullock v. Smith*, 4 Johns. Ch. 649; *Beach v. Fulton Bank*, 3 Wendell, 573.

George Bowyer; which the relators were now desirous of confining to six years; waiving all the rest.

Mr. Mansfield, Mr. Lloyd, Mr. Graham, Mr. Fonblanque, Mr. Romilly, and Mr. Christian, for the Relators. Upon the strict right, if the hardship is objected, there is no hardship in making a trustee account; and there can be no difference from the trust falling upon the heir at law. However, the University have no objection, if the Court think it proper, to waive the demand of the rents and profits, so as not to go farther back than six years. The Defendant Whittington however has not even offered to account for that time. The only argument is, that till the charter is obtained, the rents and profits are not given to the charity. Your Lordship has determined, that it is impossible to sustain that; and it is plain upon the will, the estate is given to the charity from the moment the preceding limitations expire; and there cannot possibly be a resulting trust for the heir.

The other application is for the appointment of a receiver in the form of a motion. Upon what ground Lord Camden did not grant a receiver is no where explained. It was the apprehension [* 301] in Westminster Hall, that it had been granted.

The circumstances are now very different; for every step has been taken for the execution of the trust; and it waits for nothing but to have the amount of the rents and profits ascertained, in order to determine of what number of fellows the college shall consist. The great opposition to this charity has been carried on by means of the funds of the estate given in support of it. The exceptions are a complete proof of the spirit. There is no instance of a receiver being refused, where an estate has been given upon a trust of this nature: even where it has been doubtful, whether the trust could be executed.

With respect to the small estates, that did not pass by the will, by whose fault are they not to be distinguished from the charity estate? They must have the conveyances, by which the after-purchased estates were conveyed; and the confusion is occasioned by themselves. As to the mortgages, your Lordship has already determined, that they passed as part of the testator's estate; though no purchase of the equity of redemption appears.

LORD CHANCELLOR [LOUGHBOROUGH]. There will be no difficulty in fact, I apprehend, in distinguishing the leasehold lands belonging to King's College; a commission therefore will not be necessary as to them. Then with regard to the intermixed lands: that is the subject of a commission.

I hoped, you would have informed me, how I could confine the account to six years. What I felt, and feel now, with regard to the claim is, that in following the principle, which I am bound to do, and have no discretion, I should make a very ruinous decree. I should be very glad, if you could enable me to decree less than the right. It appeared to me, the account of the rents and profits was a necessary consequence: the use attaching upon the rents and

profits; for the use was good at law. The two old cases (1), to which I referred, established it, as a use not only good in this Court, but good at law.

For the Relators. The University have an interest, and are competent to consent. It is very material for them to consider, whether the foundation shall be to the extent of this enormous fund, *100,000*l.*, a foundation totally different from that [*302] intended. The Court may upon the admission of the University make a decree restraining it to what the foundation may want.

Lord CHANCELLOR. I feel great difficulty in doing it, with a great desire, that it should be done. If I was to arbitrate in it, I should have no difficulty in saying, all the public purposes would be as well answered. Though with the consent of parties, who have no right to consent, I should make a decree with a little blot in it, I will do it however, if, after it is done, you will take an act of Parliament to confirm the decree.

Mr. *Piggott* and Mr. *Richards*, for the Defendants Sir George Bowyer and Mr. Whittington. *The Attorney General v. The Bishop of Oxford* (2) turns out to be a decided case; and it is therefore an authority, that if the particular application fails, no other can be substituted. In a cause lately before the Master of the Rolls, by consent certainly, a legacy was given to educate Servitors for Trinity College. They refused to take it upon those terms. They had made a resolution against it; and the next of kin took the property. There are many cases of that sort.

With respect to the appointment of a receiver, it was competent to the relators to have redressed Lord Camden's refusal of a receiver, if that was wrong. The objection to a receiver is, that the lands cannot be separated. With respect to the account, consider, how long they have lain by.

As to the mortgages, there is no evidence, that in 1717 the devisor was in possession of those lands, except as to the mortgage in fee. At that time it was money. As to the exception with respect to the estates of Gamlingay and Crawden, the exception was over-ruled without prejudice to bringing the question to whom they belonged, before the Court hereafter. An inquiry therefore ought to be directed as to the interest of the testator in those estates at the date of the will, with liberty to state material circumstances.

For the Relators. That has been done by the order made upon hearing the exceptions. They have had that inquiry; and upon that your Lordship has decided against them. The Court meant *only, that they should not be barred from bringing [*303] any suit upon it, if they thought fit: not, that it should be again brought forward in this cause before the Master.

As to the mortgages, the question is already determined.

(1) *Porter's Case*, 1 Co. 16; the case of *Sutton's Hospital*, 10 Co. 1.

(2) See the case correctly stated, *ante*, vol. iv. 431, in *Corbyn v. French*; *Attorney General v. Andrew*, iii. 633.

LORD CHANCELLOR [LOUGHBOROUGH]. There has been great neglect certainly; and if it was the case of an individual, I should not hesitate a moment not to allow the account. But I will take the risk of making the decree, as I have stated.

There must be a commission; and the very ground for appointing a receiver is, that the lands cannot be separated. I take it, these are not distinct lettings; the doubt being, which belongs to which: but I apprehend, in each farm there may be part belonging to Sir George Bowyer, part to the charity; and one rent only paid. If the fact is so, there is no individual rent: but the tenant pays so much rent, part belonging to the College, part to Sir George Bowyer. Will the tenants pay to Sir George Bowyer, holding as I have stated? Will they not rather make that a ground for not paying rent. The Master could report no otherwise than he did; for they would give him no information: but I have no doubt, the moment the commission has issued, perhaps without executing it, there will be no farther difficulty.

As to the mortgages, I will not presume, that he was not in possession. I must decide exactly as between the devisee and the executor. What is personal estate is to be decided at the time of the death. If it is no longer money, but land, by a release of the equity of redemption, it will go to the devisee of the freehold or leasehold estate; and I would never suffer the personal representative to take that as personal estate. It is no longer money. At the date of the will, I take it upon the Report, it was mere money, a mortgage title: but if he lived the period, when all the equity of redemption was gone (a), then it exists in no shape as part of his property but as land, held either by a leasehold title or a freehold title; and I never would take it up again as money in favor of the [* 304] executor. There is no equity between the heir and * executor or the devisee and executor (1). The error is in supposing, the personal estate is to be taken at the date of the will. At the death do I find this as part of his personal estate? No: I find it as land. Some person must have a right to state it to be money; and no such person was existing at his death. It is clear, between the heir and executor, that if the equity of redemption is gone, this Court will not keep up the charge for the sake of the personal estate. His title to it as land is antecedent to his will. I cannot tell the point of time, at which it became land. I can find no other date, at which the title accrued to him, but the date of the conveyance which is antecedent to the will.

(a) As to the length of time which will bar an equity of redemption where the mortgagee has been in possession without any acknowledgment of the mortgage title, see *Trash v. White*, 3 Bro. C. C. (Am. ed. 1844,) 291, note (a); *Perry v. Marston*, 2 ib. 399, note (a) and (b); *ante*, 3 V. 714, note (c); *Edsell v. Buchanan*, *ante*, 2 V. 83.

(1) *Walker v. Denne*, *Chitty v. Parker*, *ante*, vol. ii. 170, 271; *Swann v. Forrester*, *Halliday v. Hudson*, iii. 41, 210; *Croft v. Snee*, *Kennell v. Abbott*, iv. 60, 802; and the notes, i. 45, 204.

With respect to the estates of Gamlingay and Crawden, I cannot let that go again to an inquiry before the Master.

The decree directed an account of the rents and profits for six years. A commission was directed to issue to distinguish the lands purchased after the date of the will in Suffolk, claimed by Sir George Bowyer, from the lands in Suffolk, which passed by the will. It was ordered, that a receiver should be appointed of the rents and profits of all the estates devised except the estates in Suffolk: with liberty to the relators to apply for a receiver of those estates, in case the commission should not be returned within six months: the Master to make a separate report as to the receiver. It was ordered, that the value to be set upon the movable barns and other buildings, that did not pass by the will, not being fixed to the freehold, should be paid to the Defendant Whittington. Such of the title deeds as relate to the devised estates were directed to be brought before the Master; the relators' subsequent costs to come out of the six years' rents and profits: no costs to the other parties; and the Court observed, that no alteration was intended in any order made as to prior costs (1).

The Attorney General [Sir John Mitford], (*Amicus Curiae*), in the course of the argument mentioned a case upon the will of a Mr. Simpson, before Lord Kenyon, when Master of the Rolls; who thought, if * the charitable disposition could not take [* 305] place in the form intended, the next of kin, to whom according to his opinion in default of the charity the property was to go, might arrange it.

The Lord CHANCELLOR expressed his approbation of the conduct of the University.

SEE, *ante*, the notes to S. C. 3 V. 714.

(1) *Attorney General v. Vigor*, *post*, vol. viii. 256.

BYNE v. POTTER.

[1800, MARCH 1, 6.]

THE Defendant dying after service of the *subpœna* to hear judgment, whether upon a bill of revivor a new *subpœna* to hear judgment is necessary. (a) *Quære*. When an appeal is abated in the House of Lords, the order to revive is obtained of course; and there is no fresh summons, (b) [p. 305.]

IN this cause there was only one Defendant. The *Subpœna* to hear judgment was served upon the 4th of June, 1799. In February following the Defendant died. The usual order to revive was obtained; and an appearance was entered for the executor: but no answer was put in. When the cause came on, the Defendant not appearing, the Plaintiff was proceeding in the usual manner to take such decree as he would abide by; but a doubt was suggested by the Court, whether a new *Subpœna* to hear judgment ought not to have been served upon the executor: otherwise he would not have notice. The Register thought a new *Subpœna* necessary.

The *Attorney General*, [Sir John Mitford], being referred to by the Lord Chancellor, was of a different opinion; observing the inconvenience, that would arise, where there are many Defendants: the day being past, it must be for a new day, and be served upon all the Defendants; and the order of revivor expresses, that the cause shall stand revived "in the same plight," &c.

LORD CHANCELLOR [LOUGHBOROUGH]. It would be very convenient to consider the service of the order to revive as notice. When an appeal is abated in the House of Lords, the order to revive is obtained of course; and there is no fresh summons.

The Court directed an inquiry into the practice: but it became unnecessary; as on the 6th of March the Defendant appeared (1).

IN *Bray v. Woodran*, 6 Mad. 72, it was held, that if a cause abates after it has been set down, and a *subpœna* to hear judgment once served, upon a bill of revivor no new *subpœna* to hear judgment is necessary.

(a) See 2 Madd. Ch. Pr. (4th Am. ed.) 450. The cause having been set down for hearing, and the registrar's note thereof obtained, the next step necessary to be taken is to issue a *subpœna* to hear judgment. Although the cause be set down on a peremptory undertaking, yet the *subpœna* to hear judgment is necessary. *Dixon v. Skum*, 18 Ves. 520. When a cause, however, has been set down and a *subpœna* served, and it becomes necessary to revive the suit, it is not necessary to serve a fresh *subpœna*. *Bray v. Woodran*, 6 Madd. 72; Ayckbourn, Ch. Pr. (Lond. ed. 1844,) 111, 112.

(b) See 2 Smith, Ch. Pr. (Am. ed.) 47; 2 Madd. Ch. Pr. (4th Am. ed.) 579, 580.

(1) Where the suit has abated by the death of the Plaintiff, though the Defendant has appeared and answered the original bill, yet if he is in confinement, or cannot be found, the Plaintiff in the bill of revivor must proceed under the statute 5 Geo. II. c. 25. Practical Reg. edit. by Mr. Wyatt and the *Anonymous Case*, 3 Atk. 390, and *Henderson v. Meggs*, 2 Bro. C. C. 127, there referred to.

A *subpœna* is not necessary to an amended bill: *ante*, *Angerstein v. Clarke*, vol. i. 250; *Skeffington v. —*, iv. 66; see the note, i. 250.

DE MIERRE v. TURNER.

[1800, MARCH 7.]

LEGACY in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the mean time have happened to him, so as to deprive him or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family: but in case he fail in business at any time before the age of 32, then in trust for the support of him, his wife and children, as the trustees think proper, so long as he shall labor under the effects of any misfortune in trade: but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife and children, for his life; and if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will; and if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the 28th year of his age being discharged under a deed of composition, the legacy was decreed to him; the trustees and his children not opposing it: but the Court observed, that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified.

FERDINAND DE MIERRE by his will, dated the 13th of November, 1796, gave and bequeathed to his worthy and most esteemed friends Anthony Francis Haldimand and Samuel Horne, Esqrs. the sum of 5000*l.*; upon trust, that they or the survivor of them should place out the same in such of the public funds as they or he should think most advantageous in their own names, and pay the interest and dividends arising therefrom to his dear son John David Albert De Mierre to and for his own use and benefit. The will then proceeded with the following proviso:

"Provided that no misfortune in business shall in the mean time have happened to my said son so as to deprive him or any family he may then have of the benefit of the said sum of 5000*l.* or the produce thereof: it being my express meaning and intention (as his fortune in other respects is amply sufficient) he set the said sum of 5000*l.* and the produce thereof apart, and thereby and thereon to form a certain and permanent provision for my said son or any family he may have at that period: but it is my will, that in case my said son fail in business at any time before he attains the age of thirty-two years, that then my said trustees or the survivor of them or the executors or administrators of such survivor shall still continue to stand possessed of the said sum of 5000*l.*, and pay the interest or annual dividends thereof for the support of him my dear son his wife and children in such manner and form as my said trustees or the survivor of them or the executors or administrators of such survivor shall think most proper and beneficial, and shall so continue to pay the said interest and dividends so long as my said son shall labor under the effects of any misfortune in trade: but as soon as my dear son shall be freed and absolutely discharged from the effects of any

misfortune or failure in trade, then (but not before) I order and direct the said sum of 5000*l.* and the produce thereof to be [* 307] paid or * transferred to him: otherwise the said interest and annual dividends to be continued to be paid for the support and maintenance of him his said wife and children for so long time as he shall happen to live; and I do also will and direct, that if my said son shall at the time of his death be under any difficulty arising from misfortune or failure in business, that then my said trustees or the survivor of them or the executors or administrators of such survivor shall stand and be possessed of the said sum of 5000*l.* or stock purchased therewith and the interest and dividends thereof to and for the use and benefit of his then wife child or children in such parts and proportions as he shall by his last will and testament direct and think proper: but if my said son shall die without leaving any widow child or children, that then and in such case he my said son shall have the liberty of disposing of the same by his will to such other person or persons and in such manner and form as he shall think right."

The testator appointed the trustees and his son executors; and directed, that, if his trustees or either of them should wish to retire from the trust, they might in conjunction with his son appoint others or another in their or his stead.

The testator died soon after the execution of his will. The executors invested 5000*l.* in Long Annuities in the names of Haldimand and John Turner; the latter being named as a trustee by Haldimand and the son in the place of Horne, deceased. The dividends of the stock had been ever since received by the testator's son. Haldimand wishing to retire from the trust, Robert Williams was appointed a new trustee; and the stock was transferred to him and Turner.

The son was engaged in a mercantile partnership; which failed; and the concern was discontinued. The failure did not produce a bankruptcy: but at a general meeting of the creditors, indentures of release, dated the 24th of December, 1799, were executed upon an agreement for a composition of 15*s.* in the pound, secured by the covenant of Williams with the creditors.

The bill was filed by the testator's son, who was in the twenty-eighth year of his age, against the trustees and his three infant children; praying a transfer of the stock to the Plaintiff; and [* 308] that he may * be permitted to apply the whole thereof to his own use. No opposition was made on behalf of the children; and the trustees submitted to act as the Court should direct. There was a considerable settlement upon the wife and children of the Plaintiff.

The *Solicitor General*, [Sir William Grant], and Mr. Cooke, for the Plaintiff; Mr. W. Agar, for the Defendants.

LORD CHANCELLOR [LOUGHBOROUGH]. This will is very oddly worded. It is very possible, the testator may have meant what is supposed by the Plaintiff. The Plaintiff is certainly entitled upon

the words of the will; and I think, it is reasonable enough to suppose the testator to have the intention imputed to him. There is a great appearance of confidence in the trustees. The testator takes notice in the will, that there is an ample provision for his son. It must lie upon the discretion of the trustees. Admitting, that he was effectually discharged, we have seen so many instances of a composition turning out to be a bankruptcy afterwards, that I must take notice of it. They should look well to that. I cannot examine into it; for, if he is not discharged, I do not indemnify them.

The decree was taken according to the prayer of the bill (1).

THERE is an obvious distinction between a disposition to a man until he shall become bankrupt, and then over, and an attempt to give him property, but to prevent his creditors from obtaining any interest in it, although it is his. No doubt, property may be given to a man, only until he shall become bankrupt. It is equally clear, as a general proposition, that if property be given to a man for his life, the donor cannot take away the incidents to a life-estate; but where the limitation reduces the interest to something short of a life-estate, neither the donee nor his assignees can claim it beyond the period, or contingency, expressed in such limitation: *Brandon v. Robinson*, 18 Ves. 432; *Cooper v. Wyatt*, 5 Mad. 489; *The King v. Robinson*, Wightw. 393: and see the notes to *Dommet v. Bedford*, 3 V. 149.

FORSTER v. HALE.

[1800, MARCH 10, 13, 14.—ANTE, VOL. III. 696.]

THE Lord Chancellor upon appeal affirmed the decree upon the points decided at the Rolls; and held farther, that the case was not within the Statute of Frauds: the question being, whether a partnership subsisted in the trade of a colliery; a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing, as an incident to the trade, by operation of law; and the evidence from books and letters was admitted; and an issue refused.

THIS cause (reported, *ante*, Vol. III. 696,) came on upon the appeal from the whole decree, pronounced by the MASTER OF THE ROLLS.

On behalf of the Defendants an objection was taken to evidence, particularly to the books, the entries being known only to themselves, and to Rowntree's and Kent's letters. It was observed, that this was gaining an interest in real estate without any writing; the question being only, whether there was a declaration of trust within the statute of frauds (2).

* The Lord CHANCELLOR [LOUGHBOROUGH], observed, [* 309] that was not the question: it was, whether there was a

(1) Such a provision, applied to a bankrupt's own property, is void as against the creditors: *post*, *Higginbotham v. Holme*, vol. xix. 88, and see the note, 99, to *Ex parte Vere*; [see also *Bridgen v. Gill*, 16 Mass. 522; *White v. Jenkins*, 16 Mass. 62.]

(2) 29 Char. II. c. 3, s. 7.

partnership: the subject being an agreement for land, the question then is, whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact, that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership (a).

As to the books his Lordship said, they were clearly evidence against them; and Burdon's executors had a right to see them all.

The objection was over-ruled.

The *Solicitor General*, [Sir *William Grant*], and Mr. *Steele*, for the Plaintiff; and Mr. *Romilly*, for the Defendant, Kent, in support of the decree.

The declaration of the Statute of Frauds as to trusts is something different from that as to agreements concerning land, requiring, that trusts shall be manifested by writing. The party may publish evidence under his own hand; and that is right; for a trust is often to be established against an unwilling party. The Plaintiffs could have no interest in attempting to introduce parol evidence, or to induce the Court to deviate from the provisions of the statute; for every thing, that exists in this cause in writing, leads to establish the trust; and there is nothing to shake it except some parol declarations, alleged to have been made by Mr. Burdon. This case is an instance of the wisdom of the statute in excluding parol evidence; for those declarations are quite contrary to what must have been the fact. They were not made by Mr. Burdon with a view to deceive his partners, but merely to keep the matter secret: declarations, men frequently make, merely to veil their affairs from the knowledge of others; which shows, how unwise it is to rely upon such declarations.

[* 310] * The first letter, taken by itself, perhaps is not much to be relied on: for there are other ways, in which it might be construed; as, with reference to Kent's interest as fitter: but it is the beginning of a correspondence; all of which has the same tendency. The second letter is stronger. In using the expression "for your sakes," he could not be anxious for his co-lessees of the colliery; of two of whom, Peareth and Wren, he knew nothing. The persons he was principally concerned with were the bankers. The threat he holds out to them is as to the payment of the money due to him, not, that he will not give them a share in the colliery. That he apprehends will go with the ship. There is not the least

(a) See note (b), *ante*, to p. 193, and the cases upon this point there cited; *Thornton v. Dixon*, 3 Bro. C. C. (Am. ed. 1844,) 200, note (a); *Story, Partnership*, § 93; 3 Kent, (5th ed.) 37, 38, 39, and notes; 1 *Story, Eq. Jur.* § 674; *Dyer v. Clark*, 5 Metcalf, 562; *Howard v. Priest*, 5 Metcalf, 582; *Hozie v. Carr*, 1 Sumner, 181-186.

hint in his communication with them, that he had any option to admit them or not. The evidence here is much less ambiguous than that in *Tawney v. Crowther* (1). In this case there is a clear reference to the proposal. By that reference the terms of the trust are as clear, as if a formal declaration had been executed. *O'Hara v. O'Neil* (2) was taken out of the statute upon much more ambiguous evidence and circumstances. It is absurd to suppose, that Mr. Burdon gives a share to these parties, meaning to take a security for his debt upon it, and that they should object to that proposal, which he made the condition of such gift; or that he having the sole interest in this property should be anxious to get a security upon it. They are made to covenant as to the trust, upon which he shall hold the fourth share of the colliery. Kent's letter is in terms of caution inconsistent with the idea of a gift.

Upon the evidence from the books the case is brought within *Lake v. Craddock* (3). The Master of the Rolls intimated, that he should have had a doubt, if it had been clearly proved, that Burdon made all the advances. I should have denied that inference. As he was the monied man in the partnership, he might have taken that upon himself. But the contrary appears. The advances were by the bank generally. There is no trace in Burdon's books of any advance upon this as a separate transaction. It is only in the books of the bank that these accounts appear. It is impossible to believe the imputation, that they made false entries for this purpose. There is no foundation for that. They had then only one of the letters. It is a strange imputation of fraud in an open shop; their accounts liable to inspection.

* The *Attorney General*, [Sir John Mitford], Mr. Mansfield, Mr. Lloyd, Mr. Richards, and Mr. Wear, for the Defendants, the appellants. The first question is a mere question of Equity: whether there is a declaration of trust sufficiently manifested by writing. Supposing, the bill cannot be sustained upon that point, the next question is purely a legal question, and a question of fact; whether under the circumstances, taking the whole of the evidence, the Plaintiffs are to be considered as partners with Burdon in the colliery. The Master of the Rolls determined solely upon the first question (4). There is nothing in these letters authorizing the Court to raise a trust. I admit, Burdon had an intention some way or other to give these persons three fourths of his share in the colliery. The word "our" in the first letter would very naturally apply to the other partners in the colliery, Peareth, Wade, and Wren. But all these expressions are much too loose; and may be accounted for by his having that intention I have mentioned.

Tawney v. Crowther is the case, not of a trust, but an agreement.

(1) 3 Bro. C. C. 161, 318. [See the notes to this case at the above pages in Am. ed. 1844.]

(2) 2 Bro. P. C. 39.

(3) 3 P. Wms. 158.

(4) See the report, *ante*, vol. iii. 636.

There was no doubt of the terms ; the question was merely, whether that agreement was sufficiently adopted in writing. In *O'Hara v. O'Neil* it was impossible to say, there was not a trust. In *Lake v. Craddock* from the nature of the transaction it could not be intended, that they were to take as joint-tenants (1).

At least the appellants are entitled to an issue.

The *Solicitor General*, [Sir *William Grant*], in reply. We certainly contended at the Rolls, that a colliery was an article of trade ; and therefore not within the statute. But considering it within the statute, *Tawney v. Crowther*, it is admitted, establishes this ; that even in the case of an agreement, which is stronger than that of a trust, you may by reference to a paper containing the terms establish it. I only cited it for that purpose. I contended at the Rolls, and I contend now, that, if we get that length, we have established a trust. I cited *O'Hara v. O'Neil*, not from any resemblance to this case, but to combat the proposition then contended for the Defendants, but not now insisted on, that you must produce an instrument framed for the express purpose of acknowledging a [* 312] * trust. I produced that case as a case, in which a fraud was intended ; and by inference from facts and circumstances a trust was raised.

When the foundation for an issue was equally laid in the inferior Court, it would be very inconvenient to permit a party to lie by, taking the chance of the decision there, and now desire an issue ; which, if asked before, would have been tried by this time, and the question at rest. At the same I cannot deny, that for the satisfaction of the Court an issue might be directed. But the ground for an issue is very singular ; that the accounts are to be investigated ; which is always a ground for withdrawing the case from the investigation of a jury, and leaving it to arbitration ; as it is impossible to try in the hurry of *Nisi Prius* a question, that requires a careful investigation and a comparison, that cannot be had at law. In the other mode the result will be more deliberately and carefully drawn, and with more chance of being right. But there is no doubt upon the evidence. All the parts strengthen each other. Taking all together, it is strong, conclusive and satisfactory.

The remainder of the argument was occupied by a long investigation of the accounts ; the result of which ascertained the following facts ; upon which the Plaintiffs relied, as proving, that the advances on account of a fourth share of the colliery were made by the four partners in the bank in equal proportions, and not by Mr. Burdon alone.

Upon the 25th of March, 1791, credit was given in the check-book for 4000*l.* on account of the colliery, under the title of Burdon, Peareth, and Co. No money was paid in then : but Burdon

(1) 3 P. Wms. 158 ; 1 Eq. Ca. Ab. 291 ; see, *ante*, vol. i. 434, 435, in *Lyster v. Dolland*, and the note, iii. 706.

having called in 4000*l.* due to him from — Milbank lent 3000*l.* of that sum to Peareth, Wade and Wren, upon their bond. Milbank's bond not being paid till the 14th of April, the sum of 3000*l.* was then received by Peareth, Wade, and Wren, and paid into the bank on the colliery account. The remaining 1000*l.* appeared by Burdon's ledger to have been paid in upon his private account, upon which he received interest from the bank. In the beginning of March the bank began to make payments to the drafts of Wade on the colliery account; and having by the 31st of December paid in that manner 3998*l.*, a balance *sheet was then [*313] signed by Burdon and the other partners, stating a balance due from the colliery of 998*l.* The sums next paid in on the colliery account were 500*l.* each by Peareth, Wade, and Wren, upon the 25th of January, 1792; and at the same time the bank by an entry gave credit to Burdon, Peareth, and Co. for 1500*l.*: which sum appeared to be taken from the private accounts of each partner in the bank in equal proportions. Similar payments by Peareth, Wade, and Wren, of 500*l.* each were made on the 13th of March and the 11th of August following; and on each occasion the bank gave credit for an equal sum, taken in the same manner from the separate account of each partner.

On the other hand the appellants insinuated, that these entries were fabricated with a view to this claim; and contended, that the alteration of the title of the account, which in October 1792 was entered as John Burdon's colliery account, showed, his partners in the bank did not consider themselves as having any interest in the colliery; as he had refused to execute the deed to let them in.

The Lord CHANCELLOR during the argument observed, that Burdon's will, coupled with the letter of the 28th of June, showed his extreme anxiety to attach the ship to the colliery. He leaves his interest in the ship to Kent; and in case the ship is sold, he gives him 500*l.* It can be ascribed to nothing but a desire to attach the ship to the colliery. He does not let Kent into the secret, that he will get more by its being sold.

His Lordship also asked, what possible defence there could have been for these three partners, if the adventure had turned out the reverse of what it was, and a bill had been brought to compel them to contribute to the loss.

March 14th. Lord CHANCELLOR [LOUGHBOROUGH]. Upon the first view, which I had of this case, both upon reading the petition of appeal, and when it was stated in Court, and upon looking afterwards to the Report of the manner, in which the cause was argued at the Rolls, it seems to me, that the Plaintiffs had undertaken a difficulty, which it was by no means necessary for them to encounter. It was treated as a case, in which the whole question would arise upon the operation of the statute of frauds. I presume, the deed, which was prepared, not having been executed by Mr. Burdon, the parties not looking much farther than that

point, the contest arose upon the idea, that it was necessary, that or some other deed should be executed, to conclude the matter between them; and, no deed having been executed, the defence was taken.

The case appeared to me in rather a different point of view. From the nature of it it seems to me, there was no occasion to affect the estate in the land: nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the Plaintiffs. The case is merely a case of agreement to share profit and loss in the trade of a colliery; which does not at all affect the ownership of the land; which is often carried on for a great number of years without any estate in the land given to those, who are to share the profits. Nothing is more common, than, where a man is tenant in fee of land, where there is a coal work, he partly sharing the rent and the profit carries it on by mere license with other persons concerned in the business of the colliery. It is therefore merely the case of an agreement, which may or may not be within the fourth section of the statute. But this particular case is not even within the fourth section; because it was 'to be executed immediately; and such an agreement, to be executed immediately, requires no writing signed by the party: but such agreements may be, and are daily, proved for and against the parties entering into them by any fair, competent, credible evidence: papers unsigned, not in the form the statute requires are the best species of evidence: when I say, the best, I do not know how to make a difference between that and the acts of the parties, but that the latter are sometimes ambiguous: parol declarations: even these are admissible evidence; and if they are clear, consistent and intelligible, will prevail.

With this idea of the case, if it had been brought originally before me, it is probable, an issue might have been directed: but from the idea I have of the case it would have been an act of mere indolence in the Court to have directed an issue; for the case appears proved in the strictest manner by the written evidence; which cannot admit of any twist or turn by any possible parol evidence, that can be given. My view of the case therefore, though it does not [*315] exactly take the course of the argument at the *Rolls, leads me perfectly to agree with the decree. I think, they had no occasion; but undertaking to establish a trust within the strict line of the statute, the seventh section, I think, they have done it; and I perfectly agree with the Master of the Rolls in adopting that letter of Mr. Burdon as a clear declaration of trust: when I say that, I mean, clear evidence in writing, that there was a trust. It is not necessary, that it should be a declaration: but a writing signed by the party may be evidence of a trust admitted in that writing, signed by him (a).

I think, it is very possible, as Mr. Wade supposes, that Burdon might have agreed to take this interest in a fourth of the colliery

(a) 3 Sugden, Vend. & Purch. (6th Am. ed.) [252,] 170; 4 Kent, (5th ed.) 305, and note; *Forster v. Hale*, ante, 3 V. 696, note (a) and cases cited.

without consultation with his partners in the bank. But, though I do not doubt Wade's evidence, he has assumed a stronger knowledge of the motives and conduct of Mr. Burdon, than he had a right to do; for, Burdon not having talked to him of any other person, taking the language of Burdon, as if he had the sole interest in that share of the colliery, he takes it, that Burdon acted solely upon his skill; leaving the management of the transaction to him, and taking no notice to him of his consulting any other person. The inference Wade draws from that is a little too wide. Another comment he makes is, that Burdon was a little nettled at one of the Plaintiffs talking of being a partner in the colliery; and expressing his resentment, said, he would leave his share of the colliery to a person, who would not give the other partners any trouble; and that he considered Forster as "a babbling person." Now, it is evident, though Mr. Burdon did not choose to have it published, and thought it a little indiscreet in Forster to talk at that period of his having an interest in the colliery, and might have applied, and very probably did apply, that term, yet it is perfectly clear, he had no such purpose ever in his mind of appointing a person to succeed him in that colliery, who would give the other partners no trouble. However that may be, if Mr. Burdon had in taking the colliery a specific intention to take it upon his own account, and not on account of himself and his partners in the bank, yet to support the adventure, to aid him a little in breaking the loss, if it should prove unsuccessful, upon the common consideration to give them an advantage in the profit, if it should turn out profitable, it is very clear, something must have passed early between Burdon and them; for though the negotiation with Mr. Ellison was early in October, it is clear the terms, *and the manner, in which the lease was to be drawn, [*316] were by no means left to Wade; for it is in evidence, that a proposal for a lease was framed; and there is a very exact, minute, comment of Mr. Burdon, very cautious, and, I dare say, judicious. It is also in evidence, that the partnership in the colliery had commenced to act before, three months before, the lease was executed by Ellison; which was in June, 1791: but we find early in the spring the bank advancing to the drafts of Wade on account of Burdon, Peareth, and Co.; one sum upon the first of March, another on the 4th of March, another afterwards on the 5th of April, before any money whatsoever had been paid into the cash of the bank on account of the colliery by any person. Now, it is impossible to suppose, the partners in the bank residing at Newcastle could have answered the drafts of Wade upon the 1st and 4th of March, without some previous communication with Burdon upon it. It would have been folly and rashness, the supposition is extravagant and idle, that they would have paid the drafts of Wade in the beginning of March without any advance of cash or check-book, without a communication with Burdon authorizing them to make those advances.

Upon the 25th of March they gave credit in their books to the

between them, that they should be interested in equal shares in his fourth of the colliery? Kent acts upon it as a thing established. He makes the proposal, not as desiring a favor, but claiming a preference to The Burdon as an owner. Burdon answers him rather quickly; "No; that can only be upon the supposition of your ridding me of The Tynemouth Castle; for that is the ship; being one belonging to two owners." He again presses them: and what is the threat? He had a singular anxiety about this ship. It is whimsical enough; considering the circumstances, that have since come out, as to the will. But what is their answer? They do not buy it. What is the threat he holds out? He might have said upon the supposition now taken by his representatives, "if you do not take the share in the ship, you shall have nothing to do with the ship or the colliery." "No:" he says, "consider, you are in my power in another way;" as to the time of paying the money due to him from the bank. He says, he is old; and the time of payment may happen soon: and he talks of himself all through as not likely to reap the benefit of the adventure. He talks of the partners in the bank as actually partners in the colliery, liable to all the hopes and fears incident to the undertaking. It is impossible to answer the argument. It was much more natural to say, "You shall not have the colliery." He does not talk of that as a thing, that could be done. He does not treat it as a subject, upon which any thing remained to be done by him. He talks of them as actually engaged in it; and all their entries in their books confirm that supposition.

Then comes another part of the transaction, Burdon having kept a very exact account with the partners in the bank desires a settlement. The result is, that 30,000*l.* is due to him against the bank. Whence does that balance arise? It is the just balance of his account with them upon the supposition, that their entries with regard to the payments upon the colliery account were just: but it is not the balance due to him upon the other supposition, that all the payments out of the cash in the bank were to be carried [*320] *to his account. It is false by 1500*l.* The balance falls short of 30,000*l.* by that sum but upon the supposition, that their applications of Burdon's cash as well as of their own to the colliery were just. It is too lightly assumed, that, because he lived at Hardwicke, he is not accurate about their accounts; for it is clear from his own ledger, that he was uniformly and constantly very vigilant and attentive to their operations in his concerns with them. He had a large stake; and was by no means inattentive; the farthest from a sleeping partner that can be imagined; as vigilant and active as any other partner can be.

The next thing is the transaction in August. He had been making codicils to his will. It was very prudent, considering his age; though I do not find, his faculties were in the least degree impaired. A more quick and intelligent man, minute and exact in his business, we seldom have seen. An instance of that is the direction he gave to Rowntree. We hardly know from his statement what the specific

direction was. As I said of Wade, I do not doubt Rowntree's evidence of the fact; nor, that Rowntree thought, Burdon did not think himself compellable. Rowntree mistakes the reason. It was not, because in point of engagement they had no right to claim: but, that he had so great an empire over them that they could do nothing. Rowntree's opinion in that respect is correct and true. What has Rowntree done? Burdon intimated to him, that he meant to take a security upon that share of the colliery for all the money due, and to become due to him from the bank; giving them the benefit that might result from the partnership, and also making them liable to the loss, if the adventure should prove unfavorable; though he looked upon it as a very prosperous adventure. His purpose was to attach to that security the charge of all the debt they owed him. In execution of this idea Rowntree prepares the deed. They talk of an assignment. The idea they had was of an assignment of his share in the colliery and a re-assignment. But Rowntree thinks it better to do it in another way: to declare a trust upon the fourth of the lease; which is not to be assigned to the partners. They have no assignment of the legal interest in the lease: but all is to remain in the person of Burdon; and he is to declare a trust. The first trust is to secure all, that might be due to Burdon: the last, after all charges are discharged, is for the benefit of the partners in the bank *in equal shares. He keeps the whole by these [*321] means in his own hands. Their observation upon it is, that it leaves them under some disadvantage. They would rather have had their interests set out distinctly, and an assignment to each, according to the idea upon which they had kept their accounts. They remonstrate. They do not appear quite satisfied with Rowntree's reason. He states that Burdon will not consent; but will have it his own way. They at last agree: but their conduct was not at all that of men afraid they should lose the tide of his favor setting in to them at that time. They act, as far as they can, considering their dependence upon Burdon. They are in no hurry. There is no pressure; and they make fair and proper remonstrances. It is impossible to answer the question put by the Solicitor General: Why should Burdon be anxious to get a security upon this? He had the thing. He had the whole interest, according to the Defendants; and why he should have thought it a clever thing to get a security upon that, which was entirely his own, for so sensible a man, or any other man, is utterly inexplicable. But if he considered it, not as about to be done, but as concluded and agreed upon, he did get an advantage to himself, not a fair one, not a due advantage, by forcing that security to be made to himself, which he knew they could not refuse.

To come to any other conclusion, it is necessary, that the letters should not be considered to bear the meaning, which any man would impute to them. You must also suppose, that these several entries, which perfectly correspond with the idea the letters prove to have subsisted in their minds and in his, were fabricated with a view by

fraud to raise an interest to themselves. It was a very odd, a foolish, species of fraud, to give themselves, upon some aspect of what might happen hereafter, and that at the chance of a discovery by any person, who might inspect their books, even their own clerks, this interest. Great stress was laid upon the alteration in the account. In my view it is quite evident, the alteration was a consequence, that in their opinion resulted from their having acquiesced in the manner Rowntree proposed by the deed to be executed a trust to be established in the colliery; for it was no longer a colliery, in which there were four distinct interests: but all was in Burdon:

he holding it, only subject to account to them for three [* 322] fourths, after all charges *defrayed. Therefore it was properly the result of that transaction, that a more proper and correct account, squaring with that deed, should be kept, as John Burdon's colliery account; as he was the only person sustaining that account. As far as it was an account to be kept in their books, he was the accounting party. They individually were not to be accountable. To suppose, they made the alteration, because they gave the thing up, is exactly analogous to the supposition, that they had made the former entries with a view to create an interest to themselves deceitfully, without being authorized by the nature of the transaction or any explanation between them and Burdon.

Upon this view of the case I am perfectly satisfied and convinced by the written evidence; which is perfectly unaffected by any parol evidence. It might square more with the written evidence upon a cross examination of Wade and Rowntree: but it is enough that it does not contradict the written evidence; and as to the books, it is impossible by any art, by any ingenuity in book-keeping, to raise them into any thing to contradict the letters. I think, they confirm the letters. It is not necessary, that the books in themselves should afford that evidence: but I confess, I think the books explaining the letters, and the letters receiving that explanation from the books, are parts of the same case. Therefore, though an issue might have been had perhaps, before the cause was canvassed, I cannot direct an issue: for if the verdict found, that these Plaintiffs were not engaged in partnership with Burdon in this colliery, I should not let that verdict stand.

The decree was affirmed.

SEE, *ante*, the notes to S. C. 3 V. 696.

LE TEXIER v. THE MARGRAVE OF ANSPACH.

[1798, JULY 25, 26; 1800, MARCH 14.]

DEMURRER by a married woman to a bill of discovery of transactions with her, as agent to her husband, allowed. (a)

THIS bill, filed against the Margrave and Margravine of Anspach, by — Le Texier and the assignees under a commission of bankruptcy issued against him, stated, that before the year 1792 the Margrave of Anspach came to reside in England at Brandenburg House near Hammersmith, and kept an establishment of attendants and officers, exclusive of menial servants, in the style of, and according to the ceremonies used by the princes of the German Empire; and the Margrave being unaccustomed to the manners of * this country authorized and empowered the Margravine [* 323] to take upon herself the management and control of all his affairs and concerns, and to act in his name in whatever she should think proper to do in regard to his establishment and the arrangement of his domestic concerns; and she has in fact from and before 1792 down to the present time, with the authority and consent of the Margrave, had the management and control of the affairs and concerns of the Margrave; and all persons, who had any business to transact with him, have transacted the same with the Margravine, as the avowed and acknowledged agent of her husband.

The bill farther stated, that it was proposed by the Margravine, and agreed to by the Plaintiff Le Texier, that he should be admitted gentleman in ordinary to the Margrave at a salary of 120*l.* a year; and the Margrave wrote a letter to the Plaintiff offering him that situation. The Margravine also proposed to the Plaintiff to contract for providing the table of the Margrave; and a contract in writing for that purpose was signed by the Plaintiff and the Margrave, or the Margravine on his behalf or by his authority, at the sum of 1100*l.* a quarter. The Margrave and Margravine giving very expensive *fetes* and entertainments, and the Plaintiff finding their style of living inconsistent with and much exceeding the terms of the contract, represented the same to the Margravine; and requested a proportionate increase of allowance. She assured him, all the extra

(a) A mere witness ought not to be made a party to a bill, although the plaintiff may deem his answer more satisfactory than his examination. Story, Eq. Pl. § 234, 519, and note; *Newman v. Godfrey*, 2 Bro. C. C. 332; 2 Story, Eq. Jur. § 1499.

This applies to a married woman *a fortiori*, for she is not compellable to give evidence against her husband in any such case. Story, Eq. Pl. § 519; *Barron v. Grillard*, 3 Ves. & Bea. 165; Story, Eq. Jur. § 1496.

Officers and members of a corporation may, however, be made parties to a bill so far as the bill seeks for discovery, though they have no individual interest in the suit, and no relief can be had against them. *Wright v. Dame*, 1 Metcalf, 237; Story, Eq. Pl. 235; Story, Eq. Jur. § 1501; *Glasscott v. Copper Miners' Co.* 11 Sim. 305.

expenses occasioned by such *fetes*, &c. should be paid or allowed him by the Margrave; and upon the faith of that assurance the Plaintiff continued to supply the table.

The bill then stated, that in October 1793 the Plaintiff by the order of the Margravine completed a pavilion in the garden according to a plan furnished by the Plaintiff; which was at the desire of the Margravine altered from the original design of a cottage; also, that the Margrave, or the Margravine by his authority and with his privity, gave directions to the Plaintiff to superintend and conduct various alterations and improvements carrying on in the house and premises, and to control and pay the bills, &c.; in doing which he had laid out 12,596*l.* 12*s.* 6*d.*; and he received from the Margrave and Margravine on account only 7065*l.* He received the 1100*l.*

[* 324] quarterly: but the *ultra* expenses * of the table are wholly unsatisfied. In 1793 the Plaintiff gave up the readings of dramatic pieces in the French language; and went to reside at a house of the Margrave's; rejecting an offer to be conductor of the Operas; and dedicating himself entirely to the service of the Margrave and Margravine. In 1794 at the instigation of the Margravine a new arrangement took place, in consequence of which the Plaintiff relinquished his former place; and was appointed master of the revels to the Margravine. Upon this occasion she wrote to the Plaintiff; and at her desire he wrote to the Margrave; and received an answer. In 1795 the Plaintiff desiring to have ascertained, what compensation he was to have for having relinquished his other pursuits and for the employment of his time beyond the 120*l.* a year, and to have his accounts settled, the Margravine told him, she considered, that he ought to have 2000*l.* besides his salary, and 200*l.* a year in lieu of the 150*l.* a year, till that sum should be paid; and she gave him a written paper signed by herself, acknowledging that she owed him 2000*l.* and engaging to pay him 50*l.* a quarter, until she should pay him that sum.

Then after some other transactions, in which the Plaintiff had been employed by the Margravine, the bill stated, that the Margravine required him to send her his receipts and vouchers for his payments and disbursements under pretence of examining and settling them. Having great confidence in her he did send them; and she has retained them. In 1796 he brought an action against the Margrave; who filed a bill against him for an account. The Plaintiff is desirous of coming to an account: but by reason that the Margravine has possessed herself of many of the vouchers and receipts for payments by him, and also, that many of the payments made by him for the use of the Margrave rest in the personal knowledge of the Margrave and Margravine only or one of them, the Plaintiff cannot have the benefit thereof without a production of such receipts and vouchers and a discovery on oath from the Margrave and Margravine.

The bill charged, that upon a fair settlement a balance of 7031*l.*

Or. 9d. is due to the Plaintiff; and prayed a discovery from the Defendants, &c.

* A general demurrer was put in by the Margravine of [*325] Anspach separately.

July 25th. The *Attorney General* (1), [Sir John Scott], *Solicitor General*, [Sir John Mitford], Mr. Mansfield, and Mr. Steele, in support of the demurrer, contended, that a discovery from the Margravine of Anspach could not be compelled: as a married woman she could not be made a witness for or against her husband.

Mr. Grant and Mr. Hart, for the Plaintiffs, insisted, that it does not follow, that because the answer cannot be read, the Plaintiffs are not entitled to a discovery; for the discovery may aid them in their proof. The bill is filed against the Margravine, as the agent of her husband; which the demurrer admits. The Margrave having delegated his power to her, she is one and the same person with him.

The *Attorney General* [Sir John Mitford] in reply said, the Court had no jurisdiction to compel a married woman to answer; when that answer cannot be used, except as instructions, what questions are to be put to her husband; and if this can be done there never will be wanting in such a bill allegations of agency.

LORD CHANCELLOR [LOUGHBOROUGH]. The bill states a great deal more than the ordinary management of a lady in her house, contracts and engagements. Upon the supposition the bill takes, that all that confidence was given to this lady by her husband, he is bound by every thing she has done, right or wrong. There is one charge in the bill, that the accounts were prepared, and the vouchers put into her hands for the purpose of being examined, and she detains them. Can I let that be without remedy? His answer would be, that he knows nothing about it; and that answer in a case of this kind might be very sincere and true: he has no papers; and knows nothing of the transaction.

There is a good deal of novelty in the case. It would be a total failure of justice, I should shut out all evidence, if, where the wife is assumed to have the whole management of her husband's affairs, with his privity, but without any actual interference on his part, I should hold, in the extent she has acted, * that she [*326] cannot be asked a question. It occurs to me, that I ought to let this demurrer stand over, till after the Margrave shall have put in his answer. His answer may remove the objection entirely.

March 14th. The Margrave put in his answer: admitting, that for the reasons in the bill mentioned he authorized and empowered the Margravine to take upon her the management and control of his domestic affairs and concerns; and to act in his name in whatever

(1) Lord Eldon.

er she should think proper to do in regard to his establishment and the arrangement of his domestic concerns: and that from the beginning of 1792, and before that period up to the present time, with his authority and consent she had the management and control of his domestic affairs, &c.; and that persons, who had any business with him in regard thereto, have transacted the same with her upon his account. He stated, that he is informed and believes, the Plaintiff's salary of 120*l.* was to cease in 1793 by agreement with the Margravine in consequence of the new contract; and spoke also as to his information and belief as to the pavilion, to be completed according to the Margravine's plan. He farther stated, that a written contract was entered into in June 1794 between the Plaintiff and the Margrave for the performance of the greatest part of the improvements at Brandenburg House for 3500*l.* which sum was paid to the Plaintiff. The answer denied, that any balance is due; and stated, that the Plaintiff evaded coming to account; the accounts he produced were erroneous, including in the charges work not done by the Plaintiff, and they did not contain all proper vouchers; that several bills were left unpaid; that the Defendant is unable to account; as it must depend upon transactions and payments to the Plaintiff; many vouchers being unknown to the Defendant, which he has no means of knowing except from the Plaintiff; who has endeavored to confound transactions done under his contract with this Defendant. In answer to the charge, that the vouchers were detained, the Defendant stated, that they were offered to the Plaintiff; and refused; and he offered to give any, that can be proved to have been given to the Margravine.

The *Attorney General*, [Sir John Mitford], Mr. Mansfield, and Mr. Steele, in support of the Demurrer. This is not to be [* 327] * distinguished from the common case; especially upon the answer of the Margrave. There is no instance of a bill against a married woman, having no interest, merely because she was the agent of her husband. The policy of the law does not admit it any more than making her a witness for or against her husband. Upon this principle every married lady may be made the object of a bill in Equity, whenever an action is brought against her husband. A wife may manage the domestic affairs in the absence of her husband; particularly in the instance of officers, who are abroad. No authority for such a bill can be produced: though there must be many instances of married women in the same situation as the Margravine.

The same sort of confidential dealing, that is made the ground of this bill, prevails between every lady and her servants. It is the course in every family for the lady to receive money for the domestic purposes; which she intrusts to her servants. She receives the bills; and they are always in her custody. In all domestic transactions the wife is the agent. It applies both to great and small families. With respect to the building contract, the same sort of bill might be filed in any instance of a contract by a married man for a

building, in which his wife may direct any alteration. The contract as to that is with the Margrave himself. The only effect is to make her a witness against her husband ; which the policy of the law will not permit. The object is to supply evidence, that cannot be otherwise obtained against the husband. If she could not be examined as a witness, how could her answer be read? No decree could be made against the Margravine. Her husband alone is chargeable. It is not suggested, that she has any interest : nor is any relief prayed against her. The utmost they state is, that she was an agent. Upon that principle a bill might be filed by any tradesman. The only ground for making a wife Defendant is, that she has an interest. If she has not, she cannot be a party. No doubt, if a husband makes his wife agent, he is bound by her acts ; as in the case of any other agent. But it is not a consequence, that a bill of discovery may be filed against her. A bill would not lie against any other agent, having no interest. A demurrer to such a bill would hold ; for the Defendant might be examined as a witness (1) ; and the only difference in this case is, that the Margravine cannot be a witness. The circumstance of her agency will not overturn the general rule of law. The rule in the case of a wife is very old, and constantly adhered to. The reason is the implacable discord and dissension, that would otherwise arise. This very case shows the *impropriety of this attempt and the wisdom of the [*328] rule.

The *Solicitor General*, [Sir *William Grant*], and Mr. *Hart*, in support of the bill. The Margrave by his answer admits, he authorized the Margravine to act in his name ; and his letter recognizes her acts ; and says, whatever she does will be properly done. His answer is not a sufficient disclosure without the farther information, which she alone can give. It was contended for the Plaintiff before, that the frame of this bill requires an answer from her ; for by the very terms of the engagement the Plaintiff was to make the contract, not with him, but with her, under a special authority from him ; and she had entered into contracts ; and various alterations were made in them. The objection was, that we were not to draw from her the evidence, that she was the agent of her husband : that must be established in some other way. He might have denied it by his answer : or he might have given such a direct answer and admission as might make it unnecessary to have her answer. But her answer is still necessary. He does not know the particulars of the contract. He speaks as to his information and belief of her transactions with the Plaintiff. The particulars can only be obtained from her. The distinct character of agent, given by the husband, takes it out of the general rule. Such a case frequently happens, when the husband goes abroad. That distinct character enables her to bind him. The Plaintiff has put in a full answer to the Margrave's bill, discovering upon oath all the sums he received without vouchers. He

(1) *Curtwright v. Hately*, ante, vol. i. 292. See the note, p. 293.

wants the same sort of answer from her. The discovery is not sought for the purpose of charging her husband, but to put the accounts upon a fair footing between the parties. Extreme inconvenience will arise from want of the answer: for it is obvious much must rest in the private knowledge of the Margravine; concerning which the Margrave does not give any denial, or state any knowledge. The Plaintiff says, that though she was put into a situation to make a bargain with him, he is in a situation, in which he cannot obtain a discovery of that. This is not the ordinary case of domestic concerns only, but various transactions, buildings, improvements in the gardens, &c. upon which a special authority was given to her to act independent of her husband. In other cases the [*329] wife acts of course in the absence of the husband: *but the Margrave put his wife in his stead specially to act upon these special transactions: and he says, he will not be answerable. His act, by interposing her in his stead, gives the Plaintiff a right to the discovery against her. The question is only, whether she authorized these alterations or not. How can that be known without her answer?

LORD CHANCELLOR [LOUGHBOROUGH]. The Margrave does not trust her to make the contract. It was a contract in writing with him. I do not think, the answer comes up to the Plaintiff's statement. The state of it is, that he left the care of his establishment to her: that was settled at 1100*l.* a quarter; and as to the other charges he states a written contract with him. That is not giving all his authority to her to act with Le Texier; and as to the vouchers, he takes upon him to give any you can prove were given to her. I do not think, the answer takes it out of the common case.

The demurrer was allowed (1).

1. It is a general principle in Courts both of law and equity, that a wife shall not give evidence against her husband: *Barron v. Grillard*, 8 Ves. & Bea. 165; *Cartwright v. Green*, 8 Ves. 405; *Alban v. Pritchett*, 6 T. R. 681: but this general rule admits some exceptions, grounded on obvious necessity; see note 2 to *Sedgwick v. Watkins*, 1 V. 49.

2. That, generally speaking, a bill cannot be sustained against a mere witness; see note 3 to *Cartwright v. Hatley*, 1 V. 292, where the exceptions to the rule are likewise stated.

(1) *Post*, vol. xv. 159; *Barron v. Grillard*, 3 Ves. & Bea. 165. Demurrer by a married woman to a discovery, that might subject her husband to a charge of felony, allowed: *Cartwright v. Green*, viii. 405.

MACKWORTH v. THOMAS.

[1800, MARCH 14.]

ARREARS of an annuity secured by bond not allowed beyond the penalty in the administration of assets.

The Statute 8 & 9 Will. III. c. 11, remedial for the purpose of recovering successive breaches to the extent of the penalty, [p. 331.]

THE bill was filed by the creditors of Iltd Thomas to obtain satisfaction out of the real estate; the personal assets being deficient. In 1788 the accounts were directed; and an inquiry as to the incumbrances.

The Defendant, the executrix, claimed before the Master to retain out of the assets in her hands the sum of 1325*l.*, the arrears of an annuity of 100*l.* a-year, granted by Iltd Thomas to her father, secured by a bond in the penalty of 500*l.* The Master having allowed her only to the extent of the penalty of the bond, and refusing to exceed that, an Exception was taken to the Report.

Mr. *Graham*, and Mr. *Owen*, in support of the Exception. In *Lord Lonsdale v. Church* (1) the Court of King's Bench were of opinion, that in the case of a common bond there was no reason, why the party should not go to the full extent of the money *due. Afterwards in *Knight v. Maclean* (2) Mr. [* 330] Justice Buller adhering to that opinion decided in the same way. But that case certainly underwent the review of Lord Thurlow; who, I admit, conceived, that Mr. Justice Buller had mistaken the course of the Court; and his Lordship was of the same opinion in *Tew v. Lord Winterton* (3). I admit, that in *Bromley v. Goodere* (4), Lord Hardwicke thought, the course of the Court was, that bond creditors could not go beyond the penalty. There is however an essential difference between the cases of a common bond and a bond to secure an annuity; especially in this Court; for this Court will look at the nature of the contract. In *Collins v. Collins* (5) Lord Mansfield expressly says, the constant course of Courts of Equity is to consider the condition of a bond as the agreement of the party. This was really a mistake in taking the penalty so low; which ought to be rectified; as in the case, where the word "*quadragenta*" was inserted for "*quadringentis*" (6). In *Bishop v. Church* (7) the remedy at law was entirely gone; and there it was held an agreement. Suppose, this was merely a deed of covenant

(1) 2 Term Rep. B. R. 388.

(2) 3 Bro. C. C. 496. See, under special circumstances, *Duval v. Terry*, Show. P. C. 15, and the note, *post*, vol. vi. 79, 92; *Clarke v. Seton*, 411, and the note, 416: not generally, *Sharpe v. Earl of Scarborough*, *ante*, iii. 557; ii. 168.

(3) 3 Bro. C. C. 489.

(4) 1 Atk. 75.

(5) 2 Bur. 820.

(6) *Simms v. Barry*, Finch, 413; 2 Ch. Ca. 225; 2 Freem. 16, stated from the Register's Book, *ante*, vol. iii. 580.

(7) 2 Ves. 100, 371.

for payment of the annuity, the Defendant would be clearly entitled. The Statute of William III. (1) says, any indenture, deed, or writing. This is as much an agreement, when contained in the condition of a bond, as if in a distinct instrument. *Collins v. Collins* distinctly decides that. There is a great difference upon the statute between an annuity bond and any other bond. Damages must be assigned upon all the breaches. Suppose, the condition of the bond was to perform and award; and the arbitrators give more than the penalty. The penalty may be waived; and the condition of the bond, being an agreement in writing, may be considered as a covenant.

Mr. Lloyd and Mr. Stratford, for the Report, were stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. This is in the administration of assets. Is it possible for the Court to let a creditor [*331] stand as a specialty creditor for more than the debt at law? There is no doubt of the proposition in *Collins v. Collins*: but then it must be enforced as an agreement between the parties; but in the administration of assets how can I possibly deviate from the law? I cannot put a larger sum into the bond than the parties have. I do not know, what I might do against the party (a): but in the administration of assets I should injure all the creditors. This decree is for the administration of legal assets. The bill is by all the creditors: an account has been directed of the specialty and simple-contract debts: can I possibly allow the representative to retain a sum, of which she could not possibly have pleaded payment in an action by a bond creditor? She could not possibly have pleaded payment of 1325*l.* under this bond. There never was a case in this Court, where the Master in the account of assets ever allowed a bond to be rated higher than the penalty. The Statute of William III. is remedial for that purpose, that to the extent of the penalty you may recover successive breaches. You take your judgment for the penalty. You do not take the penalty; but assess damages under it.

The Exception was over-ruled.

In ordinary cases, interest or arrears upon a bond cannot be recovered beyond the amount of the penalty of such bond, even against the debtor; and the present case is an authority, that no exception ought to be made, under any circumstances, when the question arises in the course of the administration of the debtor's assets,

(1) 8 & 9 Will. III. c. 11.

(a) That interest may be computed beyond the penalty of a bond, see *Tew v. Winterton*, 3 Bro. C. C. (Am. ed. 1844,) 489, note (a); *Mower v. Kip*, 6 Paige, 89; *Judge of Probate v. Heydock*, 8 N. Hamp. 491; *Baker v. Morris*, 10 Leigh, 285; *Francis v. Wilson*, 1 Ry. & M. 105.

In *Harris v. Clap*, 1 Mass. 308, interest was given in the shape of damages, even as against a surety, although the principal and interest exceeded the penalty of the bond. See also *Pitts v. Tilden*, 2 Mass. 118, Rand's note (b), p. 119; *Stowell v. Fowles*, 1 Munf. 175; *Tenant v. Gray*, 5 Munf. 494; *Snedes v. Houghlaling*, 3 Caines, 48; *Potter v. Webb*, 6 Greenl. 14.

and his other creditors might be injured by allowing the bond to be rated higher than the penalty. When the question, however, is only between the obligor and the obligee, there may be cases in which it will be only reasonable to give interest beyond the penalty; see, *ante*, note 3 to *Ex parte Mills*, 2 V. 295.

BACON v. BACON.

[1800, MARCH 17.]

EXECUTOR discharged from a loss under favorable circumstances. (a)

EXCEPTIONS were taken by the Defendant John Bacon to the Master's report for not allowing the Defendant in his discharge a sum of 700*l.*, paid by him upon the 13th of September, 1796, to John Kirby; who was appointed a co-executor with him in the will of the Reverend Nicholas Bacon, and also for not allowing a farther sum of 500*l.*, also paid by the Defendant to Kirby in January, 1797; though both those sums were paid by the Defendant to his co-executor for the purpose of paying the testator's debts in the country; where Kirby resided. The Master had allowed the Defendant only the sum of 787*l.* 2*s.* 2*d.* being the amount of the testator's debts actually paid by Kirby; who died insolvent. He had been the testator's attorney.

The claim to the full allowance of 1200*l.* was made by the Defendant under the following circumstances, appearing by his affidavit. On the 13th of September, 1796, the testator having died in August, 1796, at his house at Coddendam in the County of Suffolk, Kirby, who resided at Ipswich, *called upon the Defendant in London; and requested an advance of 700*l.*, in order to enable him to discharge the funeral expenses, and to pay such of the creditors of the testator as lived in the neighborhood: where most of them resided; with which request, Kirby informing the deponent he had no money belonging to the testator in his hands, the deponent immediately complied; knowing, that considerable debts were owing from the testator to persons in the neighborhood of Kirby; and conceiving, that Kirby, as being one of the executors, and living on the spot, was the proper person to examine into and settle such debts; and that the deponent could not have been justified in putting the estate to any expense in paying the said debts himself.

The affidavit farther stated, that upon the 10th of January, 1797, Kirby again called upon the deponent; and produced a book of accounts, containing a list of debts, which he alleged he had paid, and which exceeded 700*l.*, in which book was also an account of

(a) See 2 Williams, Executors, (2d Am. ed.) 1292, 1296; *Chambers v. Minchin*, post, 7 V. 193; *Davis v. Spurling*, 1 Russ. & My. 66; *Hanbury v. Kirkland*, 3 Sim. 265; 2 Story, Eq. Jur. § 1281, and notes.

other debts, remaining unpaid; which with the debts alleged to have been paid exceeded 1200*l*. Kirby then requested that the deponent would advance him a farther sum of 500*l*. in order to enable him to discharge the debts then remaining unpaid; and the deponent conceiving, that the entries in the book were true, complied. Kirby had been for many years the confidential agent and attorney of the testator; drew his will: and had been intrusted by him with the receipt and payment of very large sums; and the deponent had frequently in the testator's life by his directions paid Kirby considerable sums for the use of the testator.

The will contained the following clause:

"And I do hereby expressly declare, that neither the said John Brand and Samuel Kilderbee nor my said executors any or either of them their or any or either of their executors or administrators shall be answerable or accountable for any more money than shall actually come to his or their hands, nor for any loss that shall or may happen in placing out and continuing at interest any part of my said personal estate nor for the misapplication or non-application of all or any part of the money that shall be received by them respectively by virtue of this my will (provided that such loss do not proceed from or be occasioned by his or their wilful default or neglect) nor the one of them for the other of them but each of them [* 333] for his own act and deed receipt * and default only and I further will and direct that my said executors and each of them their and each of their executors and administrators shall and may deduct and reimburse himself and themselves all such losses costs charges damages and expenses as he and they shall and may sustain bear pay expend or be put unto in the execution of this my will or for or by reason of the management of the trusts hereby in them reposed."

Brand and Kilderbee were trustees appointed for a particular trust.

The will was disputed by the next of kin. After that contest was decided in favor of the will, Kirby having died in the interval, under probate was granted to the Defendant. The Plaintiff, entitled the trusts of the will, and praying the usual accounts, was an infant.

Mr. *Piggott* and Mr. *Alexander*, in support of the exceptions. The particular circumstances of this case make it very hard, if these sums are not allowed to this executor. They were applied for by Kirby for the sole and express purpose of paying debts in the neighborhood of the testator's residence: Kirby a professional man, constantly employed by the testator in his affairs; and the debts to be answered by the money being to be answered in the neighborhood. This Defendant, if he had refused the confidence, which the testator had placed in Kirby, must have gone himself into Suffolk at the expense of the testator's estate to do what the testator intended the other to do by naming him executor. This is not at all like *Sadler v. Hobbs* (1), *Scurfield v. Howes* (2), and the other cases;

(1) 2 Bro. C. C. 114. [See also (Am. ed. 1844,) p. 117, 118, and notes.]

(2) 3 Bro. C. C. 90. [See (Am. ed. 1844,) 95, notes.]

in all of which the money was placed out by the executor for the purpose of being continued there, not for the administration of the effects. Where the act is necessary, or convenient for the purpose of administering the effects, if it is done fairly and honestly, the executor shall be discharged from any loss. No act was done by the Defendant to place this money in any other situation, in which the testator did not intend it to be placed. He did not join in taking the money out of the hands of one person, in order to place it in those of another. It was not taking it from one banking house and placing it in another; but an act done in the honest, conscientious, * discharge of his trust to pay the debts. The [* 334] circumstance, which Lord Northington (1) thought worthy of consideration, occurs in this will; the clause, that the executors shall not be answerable for more than comes to their hands, nor for any loss, misapplication, &c. except by wilful default. Kirby must have been intended to perform some duty: what, if not that of paying the debts upon the spot, where the creditors resided? The testator has not only named him executor, but placed confidence in him during his life, as his attorney; not a limited confidence, as in the case of a banker. The very circumstance was relied on in *Rowth v. Howell* (2).

Mr. Graham, for the Plaintiff. The Court certainly now leans against charging even executors (3). It is true, Kirby was appointed executor: but he never proved the will; upon which there was great litigation, before it was established. Then it comes to the case of an agent, appointed by the executor. The import of the clause in the will is only, where no wilful default is to be imputed personally to the party; and cannot excuse carelessness and neglect. By his own act the Defendant has occasioned this loss. He trusted a person not in the character, in which the testator intended him. If he had proved the will, he would have taken upon himself that confidential character the testator intended to clothe him with; and would have been worthy of trust.

Mr. Piggott, in reply. Having observed, that the will was not proved till after Kirby's death on account of the dispute concerning it, but that during that time it was necessary some one should act, and take care of the effects, was stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. Supposing, Kirby had not been co-executor, but that the executor living in London, and receiving money of the testator's, had remitted to the attorney of the testator to pay the debts: could he have been liable? Kirby was in no insolvent circumstances. He was a man in business at Ipswich; had been the attorney of the testator (I take him no higher than that); was acquainted with all his affairs; had [* 335] his accounts in his hands; * and the first payment was

(1) In *Westley v. Clarke*, stated 1 P. Wms. 83, in Mr. Cox's note to *Fellows v. Mitchell*.

(2) *Ante*, vol. iii. 565.

(3) See *Balchen v. Scott*, *ante*, vol. iii. 678, and the note, 679.

three weeks after his death. In the ordinary management of executor how was he to pay the funeral expenses and the number of small debts appearing upon the books of the testator without sending the money? The payment is made by the Defendant only, because he happened to have money of the testator's in his hands at the time. If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair. Suppose, he had paid the money into the hands of his own clerk, and the clerk had ran away. Kirby could not prove the will. Supposing he had, what would have been the difference? The mention of him in the will adds to the confidence the testator may be supposed to have in him as an attorney of credit in the town. By proving, he would not have been more worthy of trust than by the nomination the testator had made of him as executor. It would have been only a difference of character; but would not invest him with more authority.

The exceptions were allowed.

SEE the notes to *Balchen v. Scott*, 2 V. 678, and the note to *Routh v. Howell*, 3 V. 565.

MILLS v. NORRIS.

[1800, MARCH 22.]

UNDER a disposition by will to the children of A. and B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. and B. it was held, that all the children without restriction were entitled; (a) and an apportionment being directed, and the interest ordered to be paid to those, who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest.

ANDREW MOFFATT by his will, dated the 26th of June, 1780, after charging his real and personal estate with payment of his just debts, legacies, and funeral and testamentary expenses, and giving several legacies and annuities, gave and devised all his freehold estates at Barking in Essex to trustees and their heirs, upon trust to receive the rents and profits during the minority of Andrew Moffatt Mills; and upon his attaining his age of twenty-one years upon trust to convey the said hereditaments and premises to him, his heirs and assigns for ever: but in case he should die before he attains his age of twenty-one years, then that his said trustees should sell and dispose of the same; and that the money arising by such sale should

(a) *Hill v. Chapman*, ante, 1 V. 405, note (b); 2 Williams, Executors, (2d Am. ed.) 797, 798; *Congreve v. Congreve*, 1 Bro. C. C. (Am. ed. 1844,) 530, 532; *Andrews v. Partington*, 3 ib. 401, and notes; *Annable v. Patch*, 3 Pick. 363; *Dingley v. Dingley*, 5 Mass. 535; *Myers v. Myers*, 2 M'Cord, Ch. 214; *Hastings v. Spiller*, 1 Dam, 171; *Bull v. Bull*, 8 Conn. 47.

be paid to and among and equally divided between the children of his daughters Elizabeth Mills and Martha Norris, share and share alike: such of the said children as should be sons to be paid at their respective ages of twenty-one years, and such as should be daughters at their ages of twenty-one years or days of marriage respectively: * And as to all the rest and residue of his [* 336] estate and effects both real and personal whatsoever and wheresoever, he gave, devised, and bequeathed, the same to the same trustees and the survivor, his heirs, executors, and administrators, upon trust to sell and dispose of the same as soon as they could; and upon receipt of the moneys to arise therefrom to place out and invest the same upon Government or real securities; and from time to time to call in and invest the same in other Government and real securities, and to pay, apply, and dispose of the same and the interest and produce thereof to and amongst and be equally divided between and to go to the child and children of his said two daughters Elizabeth Mills and Martha Norris in like manner as the money to arise by the sale of his real estate, in case Andrew Moffatt Mills should die, before he attains his age of twenty-one years, as before directed; and in case any child of his said daughters should marry, and die in the life-time of their respective mothers, leaving issue, then he directed, that the issue of such child should stand in the place of their parent, and be entitled to, and receive, such sum of money as such parents would have been entitled to under his said will, had they been living; and in case his said daughter should die without issue or having had issue such issue should die without issue in the life-time of his said daughters, then in trust, that his said trustees should transfer all his real and personal estate to his brothers James and Aaron Moffatt, their heirs, executors, and administrators; and he declared, that if any child of his daughter Elizabeth Mills, being a daughter, should marry, before she attains twenty-one, without the consent of her parents, if living, then such daughter or daughters so marrying should forfeit one half part of all such sums of money as she would have been entitled to under his said will; and he appointed some of the trustees executors.

After the testator's death a decree and subsequent orders were made for taking the accounts; and the Master was directed to inquire who were entitled to the residue, and in what shares, and to apportion the residue, subject to the contingencies in the will; and it was ordered, that the interest and dividends, which should from time to time accrue due upon the shares of the residue, which the Master should find the several parties were so entitled to, should be paid to such of them as were of age.

* Upon the Master's report it appeared, that the Plain- [* 337] tiffs Andrew Moffatt Mills and Elizabeth Finch Bond, two of the children of the testator's daughters, had attained twenty-one; the former, upon the 3d of September, 1796; the latter, upon the 21st of October, 1797; at which time there were four other children living. The dividends upon the stock and securities apportioned to

Andrew Moffatt Mills had been received by him from the time he attained twenty-one. Adolphus Robert Bayard, another child of Martha Norris, by her second husband John Bayard, was born upon the 30th of May, 1799, and was the only child of either of the testator's daughters born since the last order, made upon the 26th of March, 1798. The Master therefore found, that there are seven persons entitled to the residue, and therefore the other six must abate.

An exception was taken to the report upon the ground of considering Adolphus Robert Bayard entitled to a share of the by-gone interest, and reporting the shares of the other six children in the proportions, according to which the Master had made them abate.

Mr. Stanley, in support of the Exception. The objection is, that the Master ought not to have made the deduction for the seventh child: there being but six at the time. There is a variety of cases deciding, that where in such cases a particular time is specified, as where the parties are to be entitled at the age of twenty-one or marriage, any born after one has attained that period are to be excluded (1). Upon the clause of the will giving the limitation over to the testator's brothers in the event of the failure of issue of his two daughters your Lordship was of opinion, that the disposition extended to all the children of the two daughters, without reference to the age of twenty-one; and though each child would have a vested interest at that age, yet it would be liable to be divested by the birth of others. The Master's judgment is not opposed as to the capital: but it is insisted as to the interest, that the rights of the parties to the by-gone interest of the property shall not be disturbed. It has been determined that an after-born child will be entitled to a share of the subsequent interest, and cannot claim the by-gone interest.

[*338] *The Attorney General, [Sir John Mitford], and Mr. Alexander, for the Report. It is clear, the testator in this disposition of the residue did not mean it to go in all respects as the money to arise from the estate to be sold, only, that it should be divided in the same manner. It is clear, he did not mean the residue to vest absolutely and be paid upon marriage. During the lives of the two daughters it must remain in suspense both as to the interest and the capital; for nothing is given to the children, till the persons are ascertained; and then the principal and interest are given together as one accumulated fund. It is clear, the testator meant to let in all the children; and if they do not take in hotchpot, the fund will not be divided equally, which the will directs. This is certainly a very inconvenient construction: but it is the necessary one. It is very difficult to say, what the meaning of this will is. The object of the residuary disposition is interest as well as capital. In *Shepherd v. Ingram* (2) upon a disposition of all the residue of the real and personal estate to the children of Lady Irwin, share and

(1) *Ante*, *Hosie v. Pratt*, vol. iii. 730, and the note, i. 408.

(2) Amb. 448. See farther as to the questions upon Mr. Shepherd's will, *Gibson v. Lord Montfort*, 1 Ves. 485; and, *ante*, vol. iv. 287.

share alike, with a limitation over upon failure of issue, it was determined, that all the children she should ever have would upon their respective births be entitled to share: the income both of the real and personal estate belonging to those in existence: letting in the others, as they came *in esse*: that is, the whole upon the birth of the Marchioness of Hertford and till the birth of another child belonging to her: and from thence till the birth of the third it was divisible between the two; and so on.

Mr. Stanley in reply. The Court, when directing an inquiry, who were the persons entitled, must have understood, that the children were entitled to some present benefit, viz. the income, according to their number at the time that reference was made. The construction now contended for would be a very unfortunate one; for then no one will be entitled till the death of the two sisters.

Lord CHANCELLOR [LOUGHBOROUGH]. The determination upon Mr. Shepherd's will was certainly, as it has been stated by the Attorney General; and upon Lady Hertford's marriage all the accruing interest, of which she had a larger share than the other children, was carried over to her settlement. It is much the most beneficial construction * for them all. Upon this will the [*339] interest seems tied up as well as the principal. I rather incline to allow the exception. That is the most convenient and simple construction to put upon the will; and much most beneficial to them all.

The exception was allowed. _____

SEE note 3 to *Hill v. Chapman*, 1 V. 405.

THE ATTORNEY GENERAL v. BULLER.

[1800, MARCH 22.]

A GENERAL devise by a trustee did not pass the trust estate.

THE trust for the charity arose under indentures of lease and release dated in August 1635, by which Sir John Hayward conveyed estates in Shepy, Kent, to Edward Price and William Lewes to the use of Sir John Hayward; remainder to such uses as he by deed or will with two witnesses should appoint; and in default of appointment in trust to sell or otherwise convey the premises for the erection of workhouses, and otherwise for the relief of the poor in such parishes and in such manner, as Sir Richard Buller, Francis Buller, Henry Clarke and Edward Pardo, or the survivor of them, their heirs or assigns, should think fit: so as the parish of St. Nicholas in the city of Rochester be one.

John Francis Buller by his will, dated the 4th November, 1745, after several legacies proceeded thus :

“ And for the better raising and securing all and every the sum and sums of money aforesaid and just payment thereof as well as of my just debts and funeral expenses, and for the due execution and performance of this my last will and testament, I do give, devise, and bequeath, all and singular my lordships and reputed lordships, manors or reputed manors, capital, and other messuages, bartons, farms, tithes, lands, tenements, annuities, rents, reversions, remainders, and hereditaments, whatsoever, and all and every the parts and shares thereof, with their and every of their appurtenances, whereof and wherein I am in my own right, or whereof or wherein any other person or persons whomsoever in trust for me or for my use, advantage or benefit, is or are seised, possessed, or estated, or whereunto I or such person or persons in trust for me or to my use is or are entitled in or by Law or Equity, and all my right, estate, title, interest, term, and terms of years, claim and demand, what-
[*340] soever, both in Law and * Equity, of, in, and unto, the same, and every or any the part or parcel thereof, unto my second and third sons John Buller and Francis Buller, to have and to hold all and singular the said premises unto the said John Buller and Francis Buller and their heirs for ever, and all the rest and residue of my goods, chattels, rights, credits, and all my real and personal estate, not before hereby given, devised, or bequeathed, and all my right, property, and interest, therein or by Law or Equity, I do hereby give, devise, and bequeath, unto my second and third sons John Buller and Francis Buller ; and I do make, constitute and appoint them, my said sons John Buller and Francis Buller, executors of this my last will and testament.”

The object of the Information was to have a scheme prepared under the direction of the Court for executing the Charity. Upon the Master's Report, that it would be for the benefit of the charity to sell the estates, a sale took place. The Report being in favor of the title, an exception was taken by the purchaser, upon the objection, that the heir at law of John Buller, and his widow, who was his residuary devisee, ought to join : the legal fee of the premises having passed by the will of John Francis Buller to his second and third sons ; and not having descended to his eldest son James Buller ; from whom, as heir at law of John Francis Buller, the title was derived.

(1) The *Solicitor General* [Sir William Grant] and Mr. Harvey, in support of the Exception. A general devise will carry a trust estate, if not restrained by something, showing, that it was to be confined to property, to which the devisor was beneficially entitled : *Marlow v. Smith* (2) : notwithstanding what Lord Thurlow says in *Pickering*

(1) The arguments and judgment *ex relatione*.

(2) 2 P. Wms. 198.

v. *Vowles* (1). The heir and widow of John Buller therefore ought to join.

Mr. *Mansfield*, for the Report. I take the rule to be, that the general words will not pass trust estates, unless there appears to be an intention, that they shall pass.

LORD CHANCELLOR [LOUGHBOROUGH]. That is certainly the understanding at present. Perhaps the most convenient rule would have been *the reverse: as it may be more [*341] easy to find a devisee than an heir. Over-rule the Exception.

The *Attorney General* [Sir John Mitford] (*amicus curiæ*) suggested, that the rule, that a trust estate should pass by a general devise, would not be the most convenient, from the frequent instances of estates tail created by general words; in consequence of which the legal estate might get into an infant fettered by an entail (2).

THAT, unless the context of a will evince a different intent, trust estates will pass under a general devise; see, *ante*, note 7 to the *Attorney General v. Bowyer*, 3 V. 714: as to the subsequent proceedings in the matter of the charity in question in the present suit, see Jacob's Rep. 407, 414.

(1) 1 Bro. C. C. 197.

(2) See *The Duke of Leeds v. Munday*, and *Ex parte Sergison*, *ante*, vol. iii. 348; iv. 147. It is to be observed, that this devise is conceived in very general words; and perhaps, if the particular dispositions and expressions are considered, they might afford some peculiar grounds of argument on each side. The case however appears from the note, with which the reporter was favored, to have been determined on the general ground. This question, on which such difference of opinion had occurred, is settled in *Lord Braybrooke v. Inskip*, *post*, vol. viii. 417. See the note, *ante*, iii. 349.

EDEN v. SMYTH.

[1800, MARCH 1, 3, 25.]

A LEGATEE, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his hand-writing. (a) Parol evidence of declarations in conversation was produced for the same purpose: but the Court appeared to rely on the evidence in writing. (b)

Debt discharged by an entry in the testator's hand, that the debtor pays no interest nor should he (the testator) take the principal unless greatly distressed, and upon evidence of his circumstances, [p. 350.]

SIR FREDERICK EDEN, Bart. upon his marriage in January, 1792, with Miss Smyth, the only child of Mr. Smyth, settled 6000*l.* his own property; and Mr. Smyth also made a considerable settlement; and gave 1000*l.* as part of the portion of his daughter, for the purpose of purchasing furniture, a carriage, and other things requisite for the proposed establishment. He also paid the sum of 445*l.* to relieve his son-in-law from a contract, that had been entered into for the lease of a house, which it was not judged proper to complete.

He lent Sir Frederick Eden 1000*l.*, to be applied in payment of *debts; taking his bond, dated the 31st of December, 1791, for that sum. The 1000*l.* advanced for furniture, &c. not proving sufficient, and it not being convenient to Mr. Smyth to advance more, in January, 1792, he joined Sir Frederick Eden in a bond to the Reverend Jonathan Boucher, to secure 1000*l.* lent by him to Sir Frederick Eden. In 1794 Sir Frederick Eden, in consequence of re-building a party-wall and repairing his house, having occasion for the farther sum of 900*l.*, Mr. Smyth borrowed 700*l.* of George Watson, and advanced 200*l.* himself; accommodating Sir Frederick Eden with both those sums; who gave his bond, dated the 10th of July, 1794, to Watson, for securing the re-payment. In 1796, Mr. Smyth discharged that bond; but took no assignment.

(a) *Flower v. Marten*, 2 Mylne & Craig, 474, 475; 2 Story, Eq. Jur. § 705 a, 706, 706 a; 2 Williams, Executors, (2d Am. ed.) 934-937; Ram on Assets, ch. 36, p. 469-473.

Whether the doctrines of this case and of other cases which have been decided on similar principles are strictly maintainable or not on the true rules which now regulate the subject, may perhaps in the present state of the authorities admit of some doubt. 2 Story, Eq. Jur. § 706 a, 433; *Flower v. Marten*, 2 Mylne & Craig, 459; *Edwards v. Jones*, 1 Mylne & Craig, 226.

The late case of *Tufnell v. Constable*, 8 Sim. 69, seems hardly reconcilable with *Eden v. Smyth*.

Cases of this sort are clearly distinguishable from purely voluntary, imperfect gifts, or assignments of debts or other property to third persons, and also from purely voluntary contracts *inter vivos*, to which, however, at first view, they might seem to bear some analogy. 2 Story, Eq. Jur. § 706 a. See also *ib.* § 433, § 787, 793 b.

(b) See *Maybank v. Brooks*, 1 Bro. C. C. (Am. ed. 1844,) 85, and cases cited in note (b); 1 Phil. Ev. (Cowen & Hill's ed.) 548, 538, note 948 in 3 *ib.* 1384, *et seq.*

Mr. Smyth died upon the 23d of September, 1797. By his will, dated the 18th of May, 1797, among other legacies, he gave the sum of 1000*l.* to Sir Frederick Eden, to be paid within twelve months after his decease, or as soon after as his executors conveniently could. He gave the residue of his personal estate to his younger grand-children, the issue of Sir Frederick and Lady Eden, born or to be born; and he appointed his wife, Thomas Forsyth, and George Watson, executors. Sir Frederick Eden's bonds for 1000*l.* and 900*l.* were found in the testator's possession; and a memorandum, that the testator had become surety for Sir Frederick Eden, to Mr. Boucher, by bond, bearing date some time in January, 1792. On the back of the bond, dated the 31st of December, 1791, were indorsed receipts of interest; namely, the 17th of January, 1793; the 20th of January, 1794; and the 23d of January, 1795; each for 50*l.*, being one year's interest. It did not appear, that any interest had been since paid.

The bill was filed by Sir Frederick Eden, claiming his legacy; and the question raised by the answers of the executors was whether under the circumstances he was entitled to the legacy, or on the contrary was to be charged with 1900*l.*, as due to the testator's estate.

The following evidence was produced for the Plaintiff:

Extract of a letter dated the 18th of June, 1797, from the testator to Lady Eden, the Plaintiff's mother, upon the subject of Sir Frederick Eden's affairs.—“In the first place, it is necessary to *inform you, I have not the least recollection of my ever [*343] mentioning or ever intending to give them 200*l.* a year. Since I had the honor of conversing upon their situation with you at Bath, I have released them of 1000*l.* I lent him for a particular purpose I cannot name. I have paid Boucher's interest on 1000*l.*; and the principal must fall to my lot. These two sums make 100*l.* a-year. In the month of December, 1795, I gave him 500*l.* to pay his debts. The sums before advanced I shall not here mention: at some future time I mean to show you a statement of them. From them and what is above written you certainly must excuse me, when I tell you, I go no farther.”

The testator was in the habit of drawing out annual statements of his property. In 1795 he acquired a considerable fortune, about 14,000*l.* by the death of his wife's uncle the Reverend Henry Higford, who died in March 1795.

The Defendant Mary Smyth by her answer stated, that she has often heard the testator say, he should discharge Mr. Boucher's bond for 1000*l.*, as soon as he should receive a mortgage, part of Mr. Higford's property; which he did not live to receive. The answer of Watson stated, that he had often heard the testator say, he must pay Mr. Boucher's bond; but does not recollect or believe, that he declared, he should pay it, in order to discharge the Plaintiff, as soon as he should receive the amount of Mr. Higford's mortgage.

The depositions of Robert Smyth, Esq. of Gray's Inn, stated conversations with the testator; who told him, that, it being thought he

had not done enough for the Plaintiff, he wished to prove him (the deponent) that he had been very liberal. He produced a paper, in which it was stated among other things, that the Plaintiff had received the sum of 1000*l.* from Mr. Boucher; for which he had given his bond; and that the Plaintiff had received from him (the testator) the sum of 1000*l.* to enable him to discharge his debts; for which sum he had given his bond. The testator also stated the 900*l.* advanced upon the Plaintiff's bond to Watson; and said, he had given the Plaintiff the two last-mentioned sums of 1000*l.* and 900*l.*; and as to the bonds given for them the Plaintiff should never be called [* 344] * upon; for he (the testator) meant to discharge and pay off such bonds; that he had only taken his bond for 1000*l.* in order to have a check upon him; adding (to the best of the deponent's recollection) "You see Mr. Smyth I have not been ungenerous. I have given Sir Frederick Eden all these sums; and I consider myself as bound to pay Mr. Boucher's bond. It is mine. I shall settle it." The testator had other conversations with the deponent to the same effect.

James Graham, Esq. stated various conversations with the testator in 1794 and in April 1795, concerning the Plaintiff's style of life; which the testator considered too expensive. He produced a statement of the Plaintiff's income, amounting to 900*l.* a year. The deponent desiring him to increase it, he refused; saying, he had upon the marriage of his daughter given or settled 15,000*l.*, which was nearly one half of his fortune; and he had given the Plaintiff and his wife very large sums of money since; and could not in justice to himself and his wife do any more during his wife's life. The deponent still pressing him to increase the income of his son-in-law, he declared, that as soon as he could get in Mr. Higford's property, part of which was upon mortgage, he meant to invest the clear residue and a farther sum of 2 or 3000*l.* in the purchase of a real estate, and to settle the same upon the Plaintiff and his wife and their eldest son; declaring then, and afterwards, that he considered himself merely as a trustee for them for what he should receive from Higford's effects; and he desired the deponent to inquire for an estate of the value of 14 or 15,000*l.* The testator died, before he got in that money.

At other times, and in November, 1795, the deponent pressing him for an increase of 300*l.* a year for his son-in-law and daughter, he declared, he had given them much more than that sum annually since their marriage; and he produced a statement of their income, with the sums received by them at different times and paid for them by him, amounting according to the paper produced to 3325*l.* He declared, he had also engaged to pay 1000*l.* for the Plaintiff, over and above the said sums. He afterwards declared, he had discharged or released the Plaintiff from the bond for 1000*l.* [* 345] to him; and indeed he had only taken it originally to * be some check upon the Plaintiff; and he never meant to call for payment; and as to the 900*l.* he had paid part and should

pay the whole, and discharge the Plaintiff from it ; and he always considered himself bound to pay it ; and as to the 1000*l.* due to Boucher he declared, he must and should pay that debt, and discharge the Plaintiff ; and therefore he considered these sums as actually given to the Plaintiff.

This witness stated other conversations to the same effect ; and farther, that in 1797 the testator declared, he had paid the whole 900*l.* and had released the Plaintiff from the debt of 1000*l.*, and should as soon as he should receive Higford's mortgage, pay Boucher's bond, and release and discharge the Plaintiff from the same. The testator again showed him the same paper, containing the sums received by, and paid for, the Plaintiff ; to which another sum of 500*l.* advanced by the testator, since the witness had seen that paper, had been added : the testator saying, he would see, that he (the testator) had given the Plaintiff 500*l.* in December, 1795 ; also, that he had paid the interest upon Boucher's bond ever since 1795 ; and had given the Plaintiff and his wife various other sums of money and presents since ; and had discharged him from all the above bond debts of 1000*l.* and 900*l.* ; and had taken upon himself Boucher's ; for he had in the general statement of his accounts of property, which he made out annually, charged himself with that debt, as due from him, and which he should pay very soon ; and therefore he considered the Plaintiff sufficiently discharged therefrom.

Mr. Boucher in his depositions stated the transaction as to his bond. He also proved to the same effect as the other witnesses the testator's intention not to enforce payment of the bond to himself, and his intention to purchase and settle a real estate with Higford's property ; and farther stated, that the testator requested the deponent to forbear a little pressing on him in case of his making such purchase ; that he paid two years' interest upon the deponent's bond ; and said, he proposed to pay it off, as soon as he should get in Higford's money ; and that he knew the deponent looked to him alone.

The paper referred to in the depositions of Robert Smyth and Graham, as having been produced to them by the testator, contained * an abstract of the Plaintiff's receipts and ex- [* 346] penditures, and among them the following articles :

Of Reverend Mr. Boucher 1000 <i>l.</i>			
Cash advanced by J. P. S. (1)			
For house in Great Queen Street (2)	-	-	£ 425
To furnish house in Lincoln's Inn Fields	-	-	1000
To discharge debts owing before marriage	-	-	1000
To repairing his house	-	-	900
			<hr/>
			3325
To cash advanced December, 1795,	-	-	500
			<hr/>
			£3825

(1) The testator's name was James Paul Smyth.

(2) The house, that had been relinquished.

In the annual statements by the testator of his property made previously to Mr. Higford's death, the testator appeared to have stated the Plaintiff as indebted to him for the 1000*l.* bond of December, 1791; but in the annual statements for 1795 and 1796 the Plaintiff was not charged with such bond. In the statement dated the 31st of December, 1795, entitled "Debtor general stock—*Per contra* Creditor," on the credit side was the following entry "By Sir F. E——'s bond." No sum was set opposite that article as in the preceding statements.

In another paper, carrying on the account, the credit side contained a similar entry as to the Plaintiff's bond, without any sum marked against it. In the next page on the credit side this entry was crossed through with a pen, except the sum: there was, also, the following entry.

N. B. To deduct bond due to	£1000
Mr. Boucher,	new stated opposite side.

Another paper, dated the 31st December, 1795, was entitled "Extract from valuation of General Stock." The debtor side contained this entry: "1795 Dec. 31. Debts due to sundry persons, &c.: to enter bond due to Mr. Boucher 1000*l.*"

On the credit side the following entry was drawn through with a pen, except the sum: "To deduct bond due to Mr. Boucher 1000*l.* new stated opposite side."

In a similar account of property, dated the 31st of December, 1796, on the debtor side under the head "Debts due to [* 347] sundry persons," * was the following entry: "To Rev^d. Mr. Boucher per Sir F. E. and my joint bond 1000*l.*"

There was no entry as to Sir Frederick Eden or as to Boucher's bond on the credit side.

The testator's cash book contained the following entries. On the creditor's side:

" 1791, Dec. 31st, by cash lent	
Sir Frederick Morton Eden upon bond	1000 <i>l.</i> "

The debtor side contained entries under the dates, January, 1793, 1794 and 1795, of receipts of interest on Sir Frederick Eden's bond to the testator, corresponding with the receipts indorsed upon the bond. Upon the credit side:

" 1794, Sept. 17. By cash lent	
Sir F. M. Eden, same included in his bond to G. Watson	200 <i>l.</i>
1795, Aug. 18. By cash G. Watson for value in part lent by him to Sir F. Eden, per bond for 900 <i>l.</i>	500 <i>l.</i>
Dec. 15. By cash to Messrs. Child & Co.	200 <i>l.</i>
Do. to do.	270 <i>l.</i>
Do. Dowager Lady Eden	30 <i>l.</i>
The above for account of Sir F ^{ca} Eden.	
Dec. 30. By cash paid George Watson balance of the bond due to him from Sir F. Eden of 900 <i>l.</i>	200 <i>l.</i>
1795. Cash advanced Sir F. Eden this year, exclusive of the above	1200 <i>l.</i>

1796, Feb. 17. By cash Sir F. Eden to pay one year's interest upon our joint bond to Mr. Boucher - 50*l*.
 1797, Feb. 3. By cash paid the Rev^d Mr. Boucher for one year's interest upon Sir F. Eden and my joint bond - - - - - 50*l*."

An unfinished and unexecuted will of the testator's, dated the 31st of December, 1797, was found. There were also found, wrapped up in the will of May, 1797, a will, dated in 1796, which *gave the Plaintiff a legacy of 1000*l*., and two [*348] other papers, entitled, legacies and charges, which he had to pay under the wills of his uncles. One of these was, as follows :

"Legacies				
Mrs. Smyth	-	-	-	500 <i>l</i> .
Sir F. Eden	-	-	-	1000 <i>l</i> . if I pay Boucher nothing then "

The words "if I pay Boucher" were crossed with a pen. The other paper contained the following list :

"Legacies				
My wife, &c.				
Sir F. Eden	-	-	-	1000 <i>l</i> .
Mrs. Innes	-	-	-	50 <i>l</i> .
				<hr/>
To the Bruce family 1)				2748 <i>l</i> .
To Rev ^d John Boucher				1000 <i>l</i> .
				<hr/>
				4748 <i>l</i> ."

On the back of this paper also under the head "Legacy" was, after several sums, "1000*l*. F. E."

These two papers were not produced. Having been annexed to an affidavit for the purpose of proving in the Ecclesiastical Court, they could not be got back again (2).

Probate was granted of the will of 1797 only ; all the other instruments being rejected.

The Lord CHANCELLOR [LOUGHBOROUGH] expressed doubts, whether any papers could be read, that were not included in the probate ; and also observed, that it would be very difficult to introduce conversations. When the parol evidence was offered, the Counsel for the Defendants said, they should not formally object to it ; observing, that it was inapplicable. For the Plaintiff it was answered, that the evidence was offered, not to contradict, or even to explain a will, but to repel a demand.

The evidence was read *de bene esse*.

[*349]

The Attorney General, [Sir John Mitford], Mr. Richards, and Mr. Fonblanque, for the Plaintiff. The letter to Lady Eden and the various conversations in evidence show clearly, that

(1) This sum he was bound to pay under the will of his uncle.

(2) The Attorney General remarked the inconvenience attending this practice.

the testator did not consider himself as a creditor of the Plaintiff in any manner; and that what advances had been made were then treated by way of gift. The letter to Lady Eden is a declaration in writing, amounting to an assurance to her, that the situation of her son was such as would be produced by those advances, considered as gifts to him by Mr. Smyth. It would be very injurious therefore now to consider Sir Frederick Eden as debtor in those sums. It is clear also from the letter, that the testator considered, that the bond to Boucher was to be paid by him. As to the bond to Watson also, Mr. Smyth having paid it, there can be no doubt, parol evidence may be admitted to show, that he paid it as a gift to Sir Frederick Eden, and not for the purpose of creating a debt against him. He takes no assignment of that bond; but simply pays it; and has it delivered up to him. The bond was gone, after it was paid-off; and he could have no legal demand except for money paid to the use of Sir Frederick Eden. In the statements of his affairs he takes particular notice of the money he had advanced to Sir Frederick Eden; particularly, in the paper, which he showed to many persons, and to which it is to be presumed he refers in the letter to Lady Eden. One sum on account of the purpose, to pay debts, was certainly a gift. In the annual statements of his property, till 1795, he states Sir Frederick Eden as indebted to him in the sum of 1000*l.* and also the sum advanced by Boucher, as it was actually advanced for his benefit. At the end of 1795 and in 1796 he does not charge Sir Frederick Eden with that money, nor state it as part of his property; nor does he describe him as indebted in the 900*l.* paid on account of the bond to Watson. The alteration in his accounts in these respects is to be attributed to the considerable accession of fortune from his uncle. It appears, that soon after the money was advanced by Boucher, the testator intended the legacy of 1000*l.* to Sir Frederick Eden should not be paid, if that bond should be paid by him (the testator): but afterwards he struck out that; indicating, that though that bond should be paid by him, still the legacy should be paid: and in another paper, also found with the will, the legacy stands without any condition. He also enters

[* 350] Boucher's *bond as his debt. This is decisive as to that: the intention being clearly changed; he enters no sum against Sir Frederick Eden's bond to him; and casts up the sums without including that; and in 1796 and afterwards he takes no notice of that bond. All these entries are in perfect conformity with the letter to Lady Eden and the parol evidence of confidential communications with these persons, to whom he produced those statements, to show the advances he had made; and talking of his bounty to his son and daughter. The Plaintiff therefore contends, that none of these demands were intended to be made against him; the sums advanced and paid being intended as gifts; and farther, that Boucher's bond ought to be paid out of the testator's assets; and that the Plaintiff is entitled to his legacy.

In *Byrn v. Godfrey* (1) your Lordship seems to have had a different impression of the case of *Aston v. Pye* (2), from what it turns out to be upon the Secondary's note; according to which the entry was held a discharge. *Weket v. Raby* (3) is an authority for this purpose. In *Hinchcliffe v. Hinchcliffe* (4) evidence was admitted to show, what the testator considered his property, and that he had a right to dispose of; and the evidence was his books of accounts, entries and statements of his affairs, precisely such as these.

* The objection is not, that the legacy has been adeemed by subsequent advances: the advances having taken place by way of loan long before. This is not a case, in which creditors are concerned, but merely between the testator and his son-in-law; and this Court will look to the relation of the parties; though I believe, a Court of Law will not look at the consideration of blood, except in a case of a covenant to stand seised. The legacy is singular, if he had any idea, his son owed him any thing. Upon the face of the will a presumption arises against the demand. These advances are to be considered as made for the daughter and the family, as well as for the Plaintiff, not as advances independent of such common purpose. The will cannot be construed with any regard to the real intention, unless the Plaintiff is discharged. It would be too much with this evidence of intention to release, and conviction, that he was released, to determine, that no rule can reach this.

Mr. *Mansfield* and Mr. *Alexander*, for the Defendants, the Executors in trust for the infant Children of the Plaintiff. Upon what ground can the Court decide for the Plaintiff? The circumstance, that there are no creditors, can make no difference as to the admissibility or effect of the evidence. Neither can the relation of the parties be rested on. This Court does not pay more regard to the consideration of blood than Courts of Law. Settlements in consideration of blood are void against creditors in this Court just as at

(1) *Ante*, vol. iv. 6.

(2) The following account of that case is taken from the minutes in the office of the Secondary of the Court of Common Pleas:

Ashton and others, Executors, v. *Pye*, COMMON PLEAS, Easter, 28 Geo. III. Saturday, 3d May.

Judgment for Defendant. Action for 300*l.* upon a note of hand given by Defendant to his uncle, payable in twelve months after date. The cause was tried at the Sittings after Trinity Term. Verdict for Plaintiff, subject to the opinion of the Court. The case was, Thomas Pye, the uncle, made his will 17th August, 1785; and after his death the executors found the following entry:

"Henry James Pye pays no interest nor shall I ever take the principal unless greatly distressed."

Which entry bears date subsequent to the will.

Upon the case coming on to be argued the Court advised a reference to the Ecclesiastical Court, who refused to prove the same as a testamentary paper. Whereupon the Court considered the same as a discharge; and that the paper would operate as a bar against the executors.

See the case stated by the Lord Chancellor from his own note, *post*, 354.

(3) 3 Bro. P. C. 16.

(4) *Ante*, vol. iii. 516. See the note, 530. [See also note (b) to p. 516.]

law. In what way then is this claim sustained? It is not a testamentary disposition. Then it must be in some way or other a gift in his life or a release. Indeed it can be considered in no other way than as a release. No doubt, the parol evidence is true: but see the effect of parol evidence in such a case; for one part of the evidence is, that the testator took a bond, not intending it should ever be paid, and having regularly received the interest upon it till 1795. He had not released Sir Frederick Eden from the bond alluded to in the letter; though he says, he had. Could that letter have been set up as a defence to an action upon that bond? It is probable, he intended it. All the other papers were in his own possession; and he might have destroyed them at any time: They are not testamentary; and are in fact only the same sort of evidence as parol evidence, the conversations, in which he only meant to represent himself as acting with generosity. It amounts only to [* 352] this; that he had an intention of not enforcing * that instrument. What consequence follows from that? The word "advanced" is equivocal.

The cases cited do not bind this. I do not understand the ground of *Aston v. Pye*. Unless that entry operated as a release or accord and satisfaction, I do not conceive how it could possibly be taken notice of at law. As to *Wekett v. Raby*, that, as your Lordship said in *Byrn v. Godfrey*, went entirely upon the trust assumed by the residuary legatee, and her express promise and undertaking: upon the same principle with the case (1) where upon the undertaking of the heir at law the testator omitted to devise (a). It would have been fraud in the residuary legatee not to have complied with the direction according to her promise. The difficulty of finding any principle, upon which these papers and evidence can operate, is not to be got over. The Spiritual Court will not receive them as a will. Unless any thing can be shown amounting to a release or discharge in his life, the inconvenience of admitting papers, which cannot be received as testamentary, and parol evidence, making a will for the testator, is too strong.

The *Attorney General*, [Sir John Mitford], in reply. The will was executed previously to the conversation with the witness Smyth. The presumption arises from the will itself: and is confirmed and supported by the several transactions. From the direction in the will, that the legacy is to be paid within twelve months, or as soon after as his executors conveniently could, a fair inference arises, that at that time he considered the Plaintiff as not indebted to him. The letter is in perfect conformity to the will. They were both a mockery, if the intention was, that these demands should be enforced. The foundation of the Plaintiff's claims is laid in the will. It is objected, that the testator has declared what is not the fact. The answer is, it was the fact in his mind. He conceived, he had done

(1) *Ante*, *Barrow v. Greenough*, vol. iii. 152, and other cases upon the same principle collected, iii. 38, 39, in the note to *Pym v. Blackburn*.

(a) 1 Story, Eq. Jur. § 256. See *Guallaher v. Guallaher*, 5 Watts, 200.

sufficient to release the Plaintiff. The direction as to the payment of the legacy was perfectly absurd, if he had not released him. As to the 900*l.*, that is not a debt arising upon any security to the testator. It could only be the ground of demand against Sir Frederick Eden by showing, that 200*l.* of that sum, though nominally advanced by Watson, was *really advanced by [* 353] the testator; and that he had paid the sum of 700*l.* to Watson. No declaration of trust was executed: but the bond was simply paid, and being in the testator's hands, between persons in this relation a presumption of gift arises, unless the contrary is shown. They stand not quite in the relation of father and son, but very near it. What was done for the Plaintiff by the testator was done for his daughter. His language upon all occasions is, that he has advanced to "them." Therefore he considers the interest of his daughter as concerned in these transactions. As to Boucher's bond he makes no demand upon the Plaintiff for the interest: and he declares, he considers the principal as his debt. That letter might have deceived Lady Eden with regard to the disposition of her own property.

Letters of this kind are properly admissible. In *Hinchcliffe v. Hinchcliffe* the entries made by the testator with respect to property, which really was a debt from him to his children, but which he treated as his own, had the effect of putting them to their election. Why? Because in the disposition of his bounty in the different parts of his family he had in view this circumstance; and made his arrangement in conformity with that view. So this will was made under the impression of the testator, that he had released Sir Frederick Eden from his bond, and had given him these sums of money; and then he gives this legacy. Are his executors then to say, that though this was the view of the testator and the impression upon his mind, when disposing of his property, yet these demands shall be made, and so as totally to defeat the intended bounty? They can no more say that in this case than they could in *Hinchcliffe v. Hinchcliffe*. The will and the expressions in it, utterly inconsistent with the idea, that Sir Frederick Eden was a debtor, importantly distinguish this case.

* Lord CHANCELLOR [LOUGHBOROUGH]. That position, from which you draw a presumption, from the manner of giving the legacy, will apply to all cases, where a legacy is given to a person indebted to the testator. A legacy certainly imports a bounty to the extent of that legacy.

I wish to consider of this case. Every one must feel the same inclination, that overbears my mind a little. I really believe upon the whole result of the evidence, that if any one had suggested it *to Mr. Smyth, if a person had been employed [* 354] to draw his will, (he drew it himself), he would have released Sir Frederick Eden from the debt: but how to reach it upon any principle, that is safe, I feel very embarrassing.

I will state to you what that case of *Aston v. Pye* (1) was. What I stated in *Byrn v. Godfrey*, and I stated it correctly, was, that the Court of Common Pleas had determined, they could not make it a release; and I will state to you, upon what ground, (my opinion, I confess, not quite concurring, but by no means opposing the decision of the other Judges of the Court of Common Pleas,) it did turn. The entry, that was found in the testator's book, was this:

"Pye pays no interest nor shall I ever take the principal except greatly distressed."

Lord Kenyon, then Master of the Rolls, referred them to a trial at law. An action was brought upon the note. It was contended to be a discharge of the debt. There was a large surplus. It was said, Lord Kenyon had observed, there was no proof, that there was a large surplus. That proof was given. Upon a case reserved the Court was of opinion, this could not be taken as a discharge in the life of Sir Thomas Pye, but was testamentary. It was adjourned to give time to have that entry proved. In Easter term it came on. The Court was informed, that probate was refused by the Ecclesiastical court; and the Court said, that as it belonged to the Ecclesiastical Court to say, what was or was not testamentary, and they held, it was not testamentary, it must be considered as a discharge conditional of the debt: he never having demanded interest, and having died in affluent circumstances, the executors were not entitled to recover.

That was the ground. I will state to you, that I felt a difficulty: but one is satisfied upon the whole case, that upon taking into consideration what the Ecclesiastical Court might have taken into consideration the decision was perfectly just. The Plaintiff has the case with him undoubtedly. The weak part of the case always appeared to me to be the stress, that was laid upon there being a large surplus. I think, the Ecclesiastical Court were wrong in not proving that entry in the book; for it was an entry, which could

[* 355] *speak only at the time of his death. They have proved things infinitely more insignificant.

March 25th. Lord CHANCELLOR [LOUGHBOROUGH]. The result of my opinion upon this case, after a good deal of consideration, is this. The bill is brought for the legacy of 1000*l.* The bill states, and the answers represent, that there were three debts, that had existed in the life of the testator, upon which, if they are to be taken into the account, not only there can be no demand of the legacy, but the Plaintiff will be indebted to the testator's estate to the extent of 1900*l.*, setting off the legacy against one of the debts. It is certainly one of those cases, which embarrasses the Court, in which the object is to pronounce upon an instrument, that apparently is a disposition of the property, and ought to be a complete and entire disposition of the property; yet in this and other cases it does not contain, evidently, when the circum-

(1) The Lord Chancellor stated this case from his own note book.

stances are stated, the whole intention of the testator expressly as to the administration of his property. That difficulty, too, is always increased from the consideration, that one jurisdiction, which cannot receive the evidence, that may arise from other papers, which is not in the habit of receiving that evidence, is to pronounce upon the *ultimatum* of the will, and another jurisdiction is to execute it, and in executing it is to conform itself as much as possible to the intention of the testator. That, I think, has introduced the necessity of admitting that evidence, that has been given in cases, where the administration is to be carried on in this Court, and all to be received from the Ecclesiastical Court, is the probate.

In this case, I think, the evidence has been very properly received, from the Bishop of Peterborough's case; in which his books and papers were admitted. The same rule must hold as to any memorandum, to show, what he took as the estate to be disposed of. It is equally applicable to show, what he reckoned debts due to him, and what not, where he has happened to keep any account of his own property. The demand of the Plaintiff *prima facie* is perfectly obvious. The will was drawn by the testator himself. It is not accurately drawn, as may be supposed. It is negligently done. Real estate is devised; and there are no witnesses. But there is a very distinct legacy of 1000*l.* to the Plaintiff. No doubt, upon the face of the will the legacy is due. The *doubt is [*356] raised by papers, found in the possession of the testator, that are *prima facie* evidence of debts due from Sir Frederick Eden to the testator. It is fair therefore to admit all the collateral papers relative to the circumstances of these papers, from which the doubt has arisen to show, the legacy is due; and, taking the whole of the papers together, I am satisfied, it was no intention of Mr. Smyth, that these debts should have been put in demand by his executors. As to the 900*l.* upon the circumstance of the advance of that sum, to supply the necessity, that had arisen from the accident of pulling down the neighboring house, and the damage thereby occasioned to Sir Frederick Eden's, the principal part of the money was taken from a third person; only part advanced by the testator; he paying it off without taking any assignment, it is perfectly evident (as it would have been very cruel in Mr. Smyth, having advanced it for his son-in-law, with an embarrassed income, having been frequently supplied with money by him,) that he had no intention to make any demand for the 900*l.*

As to the bond for 1000*l.*, which is a direct bond from Sir Frederick Eden to Mr. Smyth, that stands at his death as no debt; for that is specifically mentioned as a debt, from which they were released, in the letter to Lady Eden. When treating with her about the circumstances of the family, he the father of the wife, she the mother of the husband, both treating about the family, he distinctly states it as a sum of money he had given. That letter, I am of opinion, if a release had been pleaded at law, (it is not necessary to produce a

formal release), that letter would be evidence of a release, and would destroy the bond.

The other bond was one, in which Sir Frederick Eden and Mr. Smyth were both bound. Mr. Smyth by his will directs this legacy to be paid. At his death no debt at law was due upon that bond from Sir Frederick Eden to Mr. Smyth. Mr. Boucher was the creditor upon that. No debt was due to Mr. Smith, till the money was paid by him or his executors. Then, and then only, a debt at law arises from Sir Frederick Eden to Mr. Smyth's estate. The nature of the debt at law is such, that it admits of evidence to show, that the payment by Mr. Smyth, if he had paid the debt of Boucher, was intended in discharge of the engagement, and for the relief of the person engaged with him. It admits of that evidence; and, I think, that evidence exists in the present case, from the whole of the entries in the books, and particularly, a circumstance that is strong [*357] and decisive, that at a particular period *his fortune being increased from his wife's family (and he treats himself as a trustee for his daughter, because it comes from his wife's family), he changes the entry in his books. Having treated it as a debt, that Sir Frederick Eden was to answer, he turns it over to the other side of the account; and enters it as a debt his assets are to answer.

The conclusion, that bears strongly upon my mind, is, that he meant the legacy of Sir Frederick Eden beneficially; and, consistently with that, he meant, that the residue given over to the children of Sir Frederick Eden should not include these three debts; that these debts should compose no part of that residue, intended to be a provision for the younger children. Therefore decree the legacy to be paid; and that these several bonds for 1000*l.*, 1000*l.* and 900*l.* shall not be the subject of demand against Sir Frederick Eden (1).

1. For the distinction between the principal case and that of *Byrn v. Godfrey*, see note 1 to that case, *ante*, p. 425.

2. As to the admission of parol evidence, in testamentary causes; see, *ante*, note 2 to *Stratton v. Best*, 1 V. 285; the admission of such evidence in the principal case was adverted to by Lord Eldon, in *Pole v. Lord Somers*, 6 Ves. 323, not with entire approbation, though without pronouncing an opinion that it ought to have been rejected; see also *Reeves v. Brymer*, 6 Ves. 518, and note 1 to *Maitland v. Adair*, 3 V. 231.

(1) *Reeves v. Brymer*, *post*, vol. vi. 516.

JACKSON, *Ex parte*.

[1800, JAN. 22; MARCH 25.]

THE Lord Chancellor has no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting upon his security, to join in a sale obtained by a prior mortgagee under the General Order, 8th March, 1794, not producing enough for both mortgages.

IN 1792 leasehold premises were mortgaged for 1000*l.*; which mortgage was in 1794 assigned to the petitioner. In 1796 a second mortgage of the same premises for 800*l.* was made to Joseph Cockfield. In 1798 a commission of bankruptcy issued against the mortgagor.

The petitioner applying to the Commissioners under the General Order (1) for the sale of the mortgaged premises, they were sold accordingly for 1443*l.* 15*s.* The sum due to the petitioner was 1075*l.* The second mortgagee not having attempted to prove his debt, and insisting, that for that reason his right could not be affected under the General Order, chose to rest on his security; and refused to join in the sale. The petition therefore prayed, that the second mortgagee may be ordered to convey the mortgaged premises to the purchasers upon being paid the residue of the purchase money, deducting the principal and interest due to the petitioner, and the expenses of the sale and of this application.

* Mr. *Coke* in support of the petition observed, that the [*358] second mortgagee does not now offer to foreclose; and that, if this cannot be done upon a petition, there must be three bills. The petitioner claims a lien upon the bankrupt's property. It will be very easy to defeat the Order in this way.

Mr. *Johnson* for the second mortgagee said, a bill was filed by the purchasers against the first and second mortgagees to compel a performance.

The Lord Chancellor appearing inclined to make the order, the *Attorney General* [Sir *John Mitford*] (*amicus curiæ*) expressed a doubt, whether it was possible to affect the second mortgagee: the Lord Chancellor having no power to compel a party, having an interest in the bankrupt's estate, to make a conveyance; and the equity of redemption being in the second mortgagee, not in the bankrupt.

LORD CHANCELLOR [LOUGHBOROUGH]. I will think of it. Let the fact be inquired into, whether the second mortgagee was applied to by the commissioners. If he was present at the time the order was made, and suffered the sale to go on, it would be too much to permit him to lie by, and make the objection afterwards.

March 25th. LORD CHANCELLOR. I do not think, my order will extend to a second mortgagee. I have no authority, sitting in bank-

(1) General Order, 8th March, 1794; stated 4 Bro. C. C. at the end.

ruptcy, except, where the equity of redemption is in the bankrupt. Here it is not the bankrupt's property, till the second mortgage is satisfied. If the second mortgagee claims any thing as a creditor, I have a hold upon him, no doubt. The petitioner went before the Commissioners, thinking the estate was not enough for the first mortgage: but by accident it has turned out to be of more value than the first mortgage; and the second mortgagee thinks it of more advantage to exercise the right he has of redemption. I cannot make them a title, unless they will pay the second mortgage as well as the first.

The Petition was dismissed (1).

THE doctrine of the principal case was recognized in *Ex parte Topham*, 1 Mad. 38. See the 70th section of the consolidated Bankrupt Act, 6 Geo. IV. cap. 16, as to the power of assignees to redeem conditional estates, granted, conveyed, or pledged, by bankrupts. See, also, *post*, note 5 to *Ex parte Coming*, 9 V. 115.

[* 359]

KEELING v. BROWN.

[ROLLS.—1800, MARCH 26.]

THE personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, and the real estate being devised, the Court would not under a direction to the executors to pay the debts and funeral expenses as soon as conveniently may be, marshal the assets in favor of the legatees. (a)

As to the difference between debts and legacies in an implied charge on real estate by will, *quære*, [p. 362.]

THIS cause arose upon the following will of Aaron Brown: "*Imprimis* I will and direct, that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease by my executrix and executors herein after named. Item, I give, devise, and bequeath unto my nephew John Brown all that

(1) *Ex parte Topham*, 1 Madd. 38; see 2 Christ. Bank. Law, 323, 4.

(a) See the authorities on this subject cited in note (a) to *Kidney v. Coussmaker*, and *Williams v. Coussmaker*, ante, 1 V. 436; note (b), to *Williams v. Chitty*, ante, 3 V. 545; note (a) to *Manning v. Spooner*, ante, 3 V. 118; 2 Williams, Executors, (2d Am. ed.) 1222; 1 Story, Eq. Jur. § 565, *et seq.*; 2 ib. § 1247, 1247 a; *Graves v. Graves*, 8 Sim. 43, 54, 56; *Dover v. Gregory*, 10 Sim. 393; *Livingston v. Newkirk*, 3 Johns. Ch. 319; *M'Campbell v. M'Campbell*, 5 Litt. 95; *Wyse v. Smith*, 4 Gill & Johns. 295; *McDowell v. Lawless*, 6 Monro, 141; *Dunlap v. Dunlap*, 4 Desaus. 305, 319; *Rogers v. Rogers*, 1 Paige, 188; *Miller v. Harroell*, 3 Murphy, 194; *Ram on Assets*, ch. 4, § 3, p. 64, ch. 28, § 3, p. 341; *Mollan v. Griffith*, 3 Paige, 402; *Warley v. Warley*, 1 Bai. Eq. 397. Equity will marshal the real estate descended to the heir, in favor of, or for the relief of specific legatees; but it will not for such a purpose interfere with the lands devised, unless they were devised subject to the payment of debts. *Livingston v. Livingston*, 3 Johns. Ch. 153. See *Adams v. Brackett*, 5 Metcalf, 282, 283. See farther as to

my messuage, tenement, or dwelling-house, wherein he now lives at Handley and also the sum of 400*l.* to hold unto him and his heirs, executors, administrators and assigns, for ever."

The testator then devised another house to his nephew Charles Brown in fee; and gave another house to his wife for her life, and after her decease to his nephew John Brown in fee. He declared his will, that his wife should have the use of all the plate, linen, china, household goods, and furniture, which should be in his dwelling-house at his death, for her life; and after her decease he gave and bequeathed all his said plate, &c. to his nephew John Brown, his executors, &c.; excepting some articles, which he gave to his wife, to be at her own disposal. Then after some legacies he gave to John Ferneough and Samuel Hatton, their executors, administrators, and assigns, the sum of 2560*l.*, upon trust to be divided among several persons in several proportions, and among the rest 100*l.* part thereof, unto his nephew John Brown, his executors, &c.; and as to all the rest, residue, and remainder, of his estate and effects whatsoever, whether real or personal, he gave, devised, and bequeathed, the same and every part thereof to his nephew John Brown of Chesterfield, his heirs, executors, administrators, and assigns, for ever. Then, after the usual directions for the indemnity of his trustees, he appointed his wife and the said John Ferneough and Samuel Hatton executrix and executors.

The bill, filed by the executors of John Brown of Handley, one of whom was his heir at law, and also heir at law of the testator Aaron Brown, and by legatees under the will of Aaron Brown, against John Brown of Chesterfield, the executors of Aaron Brown, and others, prayed an account of the personal estate, debts, funeral expenses, and legacies; and that the personal estate may *be applied in a due course of administration; and that [*360] the legacies may be paid thereout; and if the personal estate shall not be sufficient to answer all the testator's debts, funeral expenses, and legacies, then that an account may be taken of the residuary real estate possessed by the Defendant John Brown; and that the assets may be marshalled; and that such residuary real estates, or such parts thereof as shall be necessary, may be sold, for the purpose of replacing so much of the personal estate as may have been exhausted in the payment of the testator's specialty debts.

The personal estate was amply sufficient to pay all the debts but not to answer the legacies in full.

marshalling assets, 4 Kent, (5th ed.) 420, *et seq.*; *Chase v. Lockerman*, 11 Gill & Johns. 285; *Hays v. Jackson*, 6 Mass. 149.

In all cases the personal estate is to be first applied to the payment of debts and legacies, unless charged on the real estate by the express words of the will. *Hancock v. Minot*, 8 Pick. 29; *Ancaster v. Mayer*, 1 Bro. C. C. (Am. ed. 1844,) 407, note (a), and cases cited.

Where the real and personal estate are blended and combined in one devise, the real estate becomes chargeable with debts equally with the personal. *Adams v. Brackett*, 5 Metcalf, 282; *Beach v. Biles*, 4 Madd. 187; *Hassandever v. Tucker*, 2 Binn. 525; *Witman v. Norton*, 6 Binn. 305.

(1) Mr. *Richards*, for the Plaintiffs, contended, that the testator having directed in his will, that his debts should be paid, the Court would hold that to be a charge of all the debts upon the real estate, according to *Williams v. Chitty* (2); and that, though the legacies are not mentioned in that direction, nor otherwise charged upon the real estate, yet the Court would throw the specialty debts at least upon the real estate in exoneration of the personal estate; in order that the legatees might receive payment of their legacies out of the personal estate: otherwise the legacies would not be fully paid; and the legatees would be disappointed.

Mr. *Piggott* for the Defendant John Brown, specific devisee of part of the real estate, and residuary devisee and legatee of the real and personal estate. First, as to the debts: it is impossible to make this a charge of the debts upon the real estate. The direction is, that the debts shall be paid by the executrix and executors; no devise whatsoever of the real estate or any part of it. This is not the case of a devise of real estate, after a direction, that debts should be first paid, as in *Williams v. Chitty*; nor a devise of real estate after payment of debts, as in *Shallcross v. Finden* (3); but a mere direction to the executrix and executors, superfluous I admit, but still a mere direction to them, to pay out of the fund, which was to

[*361] *come to them; and which it is agreed is sufficient to enable those, to whom the direction is given, to comply with it. It is true, if the personal estate of the testator was not sufficient to pay all his debts, the Court would marshal the assets for the benefit of the creditors by simple contract, and make the real estate bear the burthen of so much of the specialty debts as would be necessary to secure a fund for payment of the simple-contract creditors: but in this case it is agreed, the personal estate is amply sufficient for all the debts.

Secondly, what is now pressed is, that, though the personal estate is sufficient for all the debts, the Court shall throw all of them upon the real estate, if the real estate is charged by the will; or shall throw the specialty debts upon the real estate, if not charged by the will with all the debts, in order that the personal estate may be left for satisfaction of the legacies. That would be, not making the real estate bear a charge, to which it is by law liable, as it is to specialty debts, but imposing arbitrarily a burthen upon it neither imposed by law nor by the testator; and for that there is no authority.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am very clear upon both the points. Here is no charge of the debts upon the real estate (4); but a mere direction to the executors to

(1) The arguments and judgment *ex relatione*.

(2) *Ante*, vol. iii. 545; *Kidney v. Coussmaker*, i. 436; ii. 267, and the note, i. 447.

(3) *Ante*, vol. iii. 738; see *Powell v. Robins*, *post*, vol. vii. 209; *Sanderson v. Wharton*, 8 Pri. 680.

(4) *Ante*, *Gray v. Minnethorpe*, vol. iii. 103, and the three following cases: *Tail v. Lord Northwick*, iv. 816; the cases collected 3 P. Wms. 325, in Mr. Cox's note to *Haslewood v. Pope*, and the note, *ante*, iii. 106.

pay the debts, without giving them any other fund than the personal estate, out of which they can fulfil that duty. There is no devise, no trust in them, of the real estate; which is all otherwise disposed of. I cannot, with all the disposition I always feel to give such a construction to wills as shall make testators honest, construe this into a charge upon the real estate. It would be a violence to all language, and making a will for the testator; not construing or executing that, which he has made: but it is least of all necessary in this case; for it is agreed, that the testator's personal estate, which the executors were to possess, was sufficient to enable them to pay his debts. If any of the debts were to go unpaid by the insufficiency of the personal estate, I would certainly marshal the assets; making the real estate pay as much of the specialty debts as would be necessary to obtain a * fund from the personal estate [* 362] for payment of the simple-contract creditors: but here it is agreed on all hands, that it is not necessary for the payment of the debts of the testator to do so. Then, there being no charge upon the real estate for payment of debts, and there being an ample fund of personal estate for the payment both of specialty and simple-contract debts, I am asked to throw the specialty debts at least upon the real estate, that enough of the personal estate may be left for payment of the legacies; which are not charged upon the real estate; and for the payment of which I am clearly of opinion in this case there is no fund but the surplus of the personal estate, if there shall be any, after payment of all the debts of the testator. I cannot marshal the assets for payment of the legacies. I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies (1). I understand, the Lord Chancellor expressed some doubt about it (2) in the case of *Williams v. Chitty*: but upon reflection I still remain of the same opinion.

Decree an account of the personal estate, and of the debts, funeral expenses, and legacies; and if after payment of all the debts there shall not be enough of the personal estate to pay all the legacies, the legatees must abate in proportion. There is no other fund for their payment.

SEE, *ante*, the notes to *Kightley v. Kightley*, 2 V. 328.

(1) *Kightley v. Kightley*, *ante*, vol. ii. 328. See also iii. 739.

(2) *Ante*, vol. iii. 551.

SPENCER v. SPENCER.

[ROLLS.—1800, MARCH 13, 27.]

APPOINTMENT, giving very small shares to some of the objects, set aside, as illusory. (a)

The rule as to illusory appointments not to be applied, where a sufficient reason appears upon the face of the appointment: perhaps not, between parent and child, if clearly proved, (b) [p. 368.]

CATHERINE SPENCER being under the will of her uncle entitled to one fourth of the residue of his real and personal estate to her separate use, and to be at her own disposal, by her will, dated the 15th of November, 1776, taking notice of her power under the will of her uncle to make a will, after giving some annuities, gave to her son Henry Robert Rowe Spencer and her daughters Jane Spencer and Catherine Spencer, and her sons Thomas Paxton Spencer and Hutton Rowe Spencer, and also the child with whom she was then pregnant, the sum of 700*l.* each, payable in manner therein mentioned; and she gave to her husband Robert Spencer all [* 363] the residue * of her personal estate: provided nevertheless, that in case the fortune left her by her said uncle should not exceed 7000*l.*, after all expenses in recovering the same should be deducted, then she directed, and her will was, that two third parts thereof should be divided; and she gave the same two third parts thereof amongst her sons and daughters, and the child, with whom she was then pregnant, equally to be divided among them, share and share alike; and she gave the remaining third part thereof to her said husband Robert Spencer for the term of his life, and after his decease to be divided among his children in such share or shares as he should think proper; and in case her said husband should educate and bring up his sons and daughters, and the child, with which she was then pregnant, she directed, that he should have the interest of their respective fortunes; and she appointed her husband executor.

The testatrix died upon the 28th of June, 1782; leaving the five children mentioned in the will, and Robert Spencer, with whom she was pregnant at the date of the will.

By the Master's report, dated the 17th of May, 1792, made in a cause instituted upon the will of the uncle of the testatrix, it appeared, that 7266*l.* 7*s.* 1*d.* Bank 3 per cent. Annuities were remaining to the credit of the cause, Catherine Spencer's account; which were of the value of 4341*l.* 12*s.* 10*d.* at her death; and which with one fourth of the sum of 666*l.* 13*s.* 4*d.* 3 per cent. Annuities, set

(a) For cases and the doctrine in reference of illusory appointments, see Sugden, Powers, ch. 9, § 4, p. 491, *et seq.*; *Mayhew v. Middleditch*, 1 Bro. C. C. (Am. ed. 1844,) 162, note (1); *Pocklington v. Bayne*, ib. 450, 451, and notes; 1 Story, Eq. Jur. § 252, § 255; 1 Madd. Ch. Pr. (4th Am. ed.) 313–315; 4 Kent, (5th ed.) 343; *Haynesworth v. Cox*, 1 Harp. Eq. 119, note (a).

(b) See Sugden, Powers, ch. 9, § 4, p. 499, 500, 501, 502.

apart to answer the annuities, constituted her whole fortune under the will of her uncle. By subsequent orders made in that cause the share of Henry Robert Rowe Spencer was ordered to be transferred to him, he being of age; and the shares of the other children, who were infants, were carried to their accounts; the interest to be paid to their father during their minorities respectively, &c.

Robert Spencer the father, by his will, dated the 24th of December, 1791, after confirming the will of his wife, by virtue of the power to him thereby given, gave, bequeathed, and appointed, all that third part of the personal estate and fortune given in and by the same will, subject to his power of appointment, to and among his children by his said late wife from and after his decease in the shares following: the sum of 5*l*. part thereof to his son

* Henry Robert Rowe Spencer; the sum of 9*l*. other part [* 364] thereof to his daughter Jane Monkhouse; the sum of 10*l*.

other part thereof to his daughter Catherine Spencer; and the residue of the said personal estate and fortune to his sons Thomas Paxton Spencer, Hutton Rowe Spencer, and Robert Spencer, in equal shares, as tenants in common and to their respective executors, administrators and assigns.

The testator died upon the 14th of November, 1793.

The bill was filed by the three last-mentioned children claiming under the appointment; and praying a transfer of the funds remaining in Court. When the cause was heard, some of the shares had been transferred; and the annuitants being dead, the Bank Annuities that had been set apart to answer them, had fallen into the residue.

The question was whether the appointment was illusory.

Mr. *Graham* and Mr. *Steele*, for the Plaintiffs. In *Kemp v. Kemp* (1) this point was a good deal argued; and it was contended even, that an appointment of 50*l*. or 100*l*. out of 4000*l*. was illusory. But though the general rule is, that such a power of appointment does intend a bounty, yet this will is peculiar; and the words "in such share or shares as he should think proper" give a larger power than in the common cases; giving him a perfectly arbitrary power as to one third. The husband having that power has exercised his discretion. He is the best judge of the provision made for his children. This case therefore is out of the general Equity; and differs very much from most of the cases, that can be stated. The testatrix undoubtedly had it in contemplation to a certain extent to put the children out of the power of their father, and to give absolutely to the father under certain circumstances the remainder of the property for him to dispose of to them or any other persons, as he should think fit. The circumstances of this case are extremely remarkable. She meant to give her children only the proportion of 4200*l*. to 7000*l*.; and if her fortune under her uncle's will amounted to more than 7000*l*. she did not mean to give them two

(1) *Post*, 849.

thirds, but meant to give her husband absolutely the residue beyond the several sums of 700*l.*, but the event, that happened, was, that it was less than 7000*l.* Her object was to keep his children dutiful towards him; intending a benefit to him as well as to them. At her death it was not worth more than 4000*l.*; but was of much greater value in 1791; when he made his will. That circumstance influenced his appointment. Besides, one of these children was the eldest son; and the other two were married (1); and they had another provision. That is a good reason for the inequality; according to *Bristow v. Warde* (2); in which a small interest being given by the testator to a daughter, to whom he had given a provision marriage, that was considered a good reason for the difference.

Mr. *Richards* and Mr. *Hall*, for the Defendants. The general doctrine is admitted, that under a power to appoint among several persons in Equity each must have something substantial. At law the power is satisfied by giving any thing; but in Equity that will not do; unless, as in some cases, a sufficient ground appears; showing, that with regard to something else the part appointed is substantial. A Court of Equity does not admit the doctrine now urged, that the parent shall be considered as having a power to give a part not substantial merely to keep the children in obedience. This testator has assigned no reason; as in *Bristow v. Warde*. In this case there is nothing but caprice and whim. Infinite inconvenience will arise from breaking into the general rule. Whatever might have been her intention, if the property exceeded 7000*l.*, there is a clear intention, if it should be under that sum, which is the event, not to give the father any dominion over any part except as to the distribution.

The Court does not go upon the circumstance of the child being eldest or youngest. In this case nothing substantial is given to the three eldest children. A reason, as that there is property *aliunde*, must be assigned; which the Court cannot mistake; and it must appear upon the instrument; as in *Bristow v. Warde*. [*366] In this instance *there is only a conjecture, that he had some reason, founded upon the value of the stock at that time. Stress has been laid upon the words, in which this power is expressed, "as he should think proper." All powers of appointment have words of that kind: but the rule is, that something substantial must be given, if it is intended, that something shall be given to each. A father is no more entitled to exercise this caprice or whim, which is called discretion, than any other person. This therefore is within the general rule, clearly illusory. The property was completely vested in the children by the first instrument (3),

(1) Catherine was married at the hearing: but it did not appear, whether she was married at the date of her father's will.

(2) *Ante*, vol. ii. 336; *Vanderzee v. Adom*, iv. 771; *Boyle v. The Bishop of Peterborough*, i. 209, and the note, 310.

(3) *Smith v. Lord Camelford*, *ante*, vol. ii. 698.

not to be divested without some substantial reason. There is no authority, beyond a *dictum*, that disobedience or undutifulness is sufficient cause. The only case to be found, is, where one is amply provided for *aliunde*. The point made in this case has occurred; and been thought of no consideration. *Craker v. Parott* (1), *Gibson v. Kinven* (2), and many other cases.

Mr. Graham, in reply. The circumstances of this case distinguish it from those; which were upon a subject very different from a power of appointment. The question was, whether there was a trust; like the cases upon the word "desire," &c. (3): a question new at that time; though it is now determined, that words of that sort raise a trust. This will in some events give the property absolutely to be disposed of by the father. Here there is also a provision *aliunde*. This question upon illusory appointments is certainly very embarrassing. How difficult it is for the Court to say, what share will be sufficient. I agree, the children had a vested interest. That was solemnly determined in *Smith v. Lord Camelford*.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The Plaintiffs must contend, that if the father had given all to one child except one shilling to each of the others, that would be good. I should be very glad to get out of this rule; which has given me the greatest anxiety; but I fear it is impossible. I will not get of out it merely because I dislike it. *In *Kemp v. Kemp* [*367] the difficulty arises. In this case I can have no difficulty to say, this is not substantial: but in *Kemp v. Kemp* what can I do?

March 27th. MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. I am extremely sorry to find myself under the necessity of remaining of the opinion I intimated; thinking, under the circumstances, I am not at liberty to depart from that rule of the Court, which has created difficulty, and given so much uneasiness, to every Judge, since it was first adopted, as to illusory appointments. No rule has ever given me so much pain as that; and every Judge has felt the difficulties arising from it. I had hopes, that this case might have been such as to admit of being held upon fair grounds out of that rule: but upon a fair construction of the will, I am bound to apply it to the alternative in the will, upon which the testatrix has given one third of this fund, in case it falls short of 7000*l.* to these children in such shares as her husband should think proper. The effect is, that if the property should be above 7000*l.* each was to have at all events 700*l.*; and the rest was to be at the entire disposition of the husband, either to give to any one child or to any other person: but if it should not exceed 7000*l.* she was not satisfied with giving him the absolute disposition of any part; but gives two thirds

(1) 2 Ch. Ca. 228; Finch, 354.

(2) 1 Vern. 66.

(3) *Harding v. Glyn*, 1 Atk. 466, and the cases referred to in Mr. Sanders's note. *Bull v. Vardy*, *Malim v. Keighley*, *Brown v. Higgs*, *antc*, vol. i. 270; ii. 333, 529; iv. 708; *post*, 495; viii. 561, and the note, i. 272.

equally among the children ; and the remaining third she gives to her husband for life ; and after his decease among his children in such shares as he shall think proper ; excluding any other person than a child ; and making them the persons, among whom it should be divided.

It was argued, that this third was left to the disposition of the husband in such a way, that it was necessary to be divided among all : each to have a share, and, upon the clear rule, not an ideal share, giving nothing in substance ; and it being admitted, that what is given to three of the children is exactly that, which the Court says is not a good execution of such a power, that is, something meant to operate as nothing, the only question is, whether the rule is to be applied. Though I very much dislike the rule, and know, that it generally breaks in upon the intention of the party creating the power, I cannot break through it ; and am therefore obliged to say, this is not good. I desire to be understood, that I by no means intend to be more rigorous in the execution of this rule [* 368] than preceding Judges have been. On the * contrary, if ever I see a fair opportunity, I shall be glad to lay hold of it to get rid of the rule ; which in most instances is contrary to the real intention. There have been many cases, in which this sort of appointment of a nominal sum has been held good, where upon the face of the appointment itself a sufficient reason has appeared. I will go farther ; and say, perhaps, if a sufficient reason can be proved, between parent and child the Court would not apply the rule : but it must be proof, that leaves no doubt whatsoever. In *Bristow v. Warde* it appeared upon the face of the appointment. In such a case the child would be guilty of a fraud in attempting to set aside the appointment : the parent perhaps having advanced more on that account. The answer would be, he had given that child a substantive share ; who therefore could not complain of the difference : and the Lord Chancellor in that case thought that sufficient to show it was not fraudulent. The question always is, what is the intention : whether, that the party shall have some share. Here this is to be divided among his children, not merely among the children. It is too late to say, the Court have not held, that each must have a share. It is equally too late to say, that it is not to be a substantive share, or a reason to be assigned. In this case no reason is either assigned or proved.

This is distinguishable from *Burrell v. Burrell* (1). Upon that case Lord Camden must have meant, that it did not fall within the rule. His opinion must have been, that the mother had a right to give them nothing. For a guinea is the same as nothing. If one child is already provided for, I desire it not to be understood as my opinion, that in such a case the party would be bound to give that child any thing (2). The great difficulty, in these cases is to say,

(1) Amb. 660.

(2) See *post*, 861, in *Kemp v. Kemp*, this proposition thus qualified ; that the provision must come from the person executing the power ; as in *Bristow v. Warde*,

what is illusory, and what is not: as, suppose, the sum was 50*l.* or 100*l.* But in this case I am relieved from that; for clearly this testator intended by the appointment of these small sums to give nothing in effect. Therefore with great reluctance I must pronounce that this appointment is void (a); and declare, that the fund ought to be distributed equally among all the children.

As to the extreme difficulty of determining, what inequality of distribution shall be deemed illusory, and therefore not a good execution of a power to appoint among several persons; see, *ante*, note 3 to *Hockley v. Masbey*, 1 V. 143.

OSBORNE v. THE DUKE OF LEEDS. [* 369]

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1800, MAY 13, 14, 18.]

A CLAIM of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. (b)

Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, *quære*, (c) [p. 369.]

Rule of presuming against double portions, [p. 381.]

If a testator by will gives 2000*l.* a year by way of jointure to any woman he might marry, and after marriage by codicil gives his wife the same jointure, she cannot claim both, [p. 382.]

Double legacies by two instruments upon the intention, [p. 382.]

Small circumstances will raise an inference against double legacies, (d) [p. 384.]

THE late Duke of Leeds by his will, dated the 23d of June, 1791, duly executed to pass real estate according to the Statute of

ante, vol. ii. 336; see also, *post*, *Long v. Long*, 445; xii. 124, 5; and *Bar v. Whitbread*, xvi. 15.

(a) The English Statute of 1 Wm. IV. c. 46, entitled, "An act to alter and amend the law relating to illusory appointments," declares that no appointment shall be impeached in Equity, on the ground that it is unsubstantial, illusory, or nominal. This puts an end, it is said by Mr. Chancellor Kent, to the Equity jurisdiction on the subject of illusory appointments. 4 Kent, (5th ed.) 343, note.

(b) In many cases the second instrument affords intrinsic evidence, that it was intended by the testator as a mere substitution for the first; and consequently, that one legacy alone was intended, as where a latter codicil appears to be a mere copy of the former, with the addition of a single legacy, or when it is manifest that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former. See 2 Williams, Executors, (2d Am. ed.) 925, 926, and cases cited in the notes; *Attorney General v. Harley*, 4 Madd. 263; *Wray v. Field*, Madd. & Geld. 300; S. C. 2 Russ. 257; *Fraser v. Byng*, 1 Russ. & M. 90; *Watson v. Reed*, 5 Sim. 431; *Strong v. Ingram*, 6 Sim. 197; *Ridges v. Morrison*, 1 Bro. C. C. (Am. ed. 1844,) 393, and notes; *Campbell v. Radnor*, 1 ib. 273, and notes; *Moggridge v. Thackwell*, 3 ib. 528, and notes; *S. C. ante*, 1 V. 464, note (a); *Russell v. Dickson*, 1 Con. & Law, 284; *S. C.* 2 Dru. & Wal. 153; *Martin v. Drinkwater*, 2 Beav. 215; *Brine v. Ferrier*, 7 Sim. 549.

(c) See note (c), *post*, 381.

(d) See notes to *Ridges v. Morrison*, 1 Bro. C. C. (Am. ed. 1844,) 393; 2 Williams, Executors, (2d ed.) pt. 3, b. 3, ch. 2, § 7, p. 923, *et seq.*

Frauds (1), gave, devised, and bequeathed, his real and personal estate to his son and heir the Marquis of Carmarthen, his heirs, executors, and administrators, subject to the payment of his debts and funeral expenses, and to a provision for the Duchess, and also subject among other legacies charged thereon by his said will, to the payment of 10,000*l.* to his son Lord Sidney Godolphin Osborne, upon his attaining his age of twenty-one years, and 10,000*l.* each to all and every of his after-born child or children, on such of them, being a son or sons, attaining their respective ages of twenty-one years, and such of them, being a daughter or daughters, attaining that age or day or days of marriage, which should first happen; and he directed his executor, in case of the death of his wife during the minority of Lord Sidney Godolphin Osborne or during the minority or respective minorities of his after-born child or children or any of them to pay the annual sum of 100*l.*, until their respective ages of seven years, the annual sum of 200*l.* from that period until seventeen, and the annual sum of 300*l.* from that period until their respective portions should become payable, for the maintenance and education of each of them during their respective minorities; and he appointed the Marquis of Carmarthen executor.

By a codicil, dated the 18th of November, 1796, the testator gave and bequeathed to Lord Sidney Godolphin Osborne all the stocks, funds, and securities for money, he might have at the time of his death standing in his name in the books of the Bank of England or of the East India Company or other public company in England.

By a second codicil he gave some trifling legacies; upon which nothing arose.

[* 370] * He afterwards made another codicil, unattested, dated the 14th April, 1798, as follows:

“Whereas I have by my will given the sum of ten thousand pounds as a portion for Lord Sidney Godolphin Osborne; and having since otherwise provided for him I now revoke the said legacy; and do hereby give the sum of ten thousand pounds to my dear daughter Lady Catherine Ann Sarah Osborne; and I do hereby declare this to be a codicil to my last will and testament.”

The testator had by indentures of lease and release, dated the 2d and 3d of June, 1797, conveyed certain hereditaments upon trust, among other trusts, to raise the sum of 10,000*l.* as a portion for Lord Sidney Godolphin Osborne, to be paid to him, after the death of the testator, when he should attain the age of twenty-one; and, in case he should not have attained that age at the death of the testator, upon trust, that the trustees should pay, apply, and dispose of, the interest of his said portion, or so much thereof as the guardian or guardians of Lord Sidney Godolphin Osborne should think proper, in and towards the maintenance and education of Lord Sidney, until he should attain the age of twenty-one.

The children of the testator at the date of the will were the Marquis of Carmarthen, now Duke of Leeds, and two daughters, amply provided for: all by his first marriage; and one son, Lord Sidney Godolphin Osborne, by his second marriage, with the present Duchess. Another daughter, Lady Catherine Ann Sarah Osborne, was born a few weeks before the date of the third codicil.

The testator died upon the 31st of January, 1799. The only stock standing in his name at his death was India Stock, of the value of about 3000*l*.

The bill was filed by the two younger children against the Duke of Leeds, the heir at law and executor, and against the trustees; the Plaintiff Lord Sidney Godolphin Osborne praying only directions for the appointment of a guardian and maintenance: but the question arose upon the claim of Lady Catherine Ann Sarah Osborne to two legacies of 10,000*l*. In opposition to that claim the Duke of Leeds offered evidence of conversations of [* 371] the late Duke with the Duchess and with George Brooks, Esq., his Grace's agent, upon the subject of the provisions for his younger children.

The Duchess of Leeds by her depositions stated, that five weeks after the birth of Lady Catherine the testator informed her, he had made a provision of 10,000*l*. for her (Lady Catherine) by a codicil; and in frequent conversations he uniformly declared his intention to give his younger children 10,000*l*. each.

Mr. Brooks stated, that soon after the birth of Lady Catherine the Duke observed to him at various times, that, as she had not any provision, he would make a memorandum or codicil, by which he would give her 10,000*l*. About a month after her birth he told the deponent he had made a codicil; by which he had given her 10,000*l*.; repeating, that he had done so, because she had not any other provision; and it was his intention, that she should have as large a provision as Lord Sidney, except the stocks given to him in addition to the said 10,000*l*.; that upon creating the charge for his son in 1797 he declared, he would revoke the legacy to him of 10,000*l*.; and frequently before had declared, he had given him all his India Stock and Government securities; and expressly declared, that he gave such funds, that his son might have them over and above his 10,000*l*.

The questions were, first, whether the Plaintiff Lady Catherine was entitled to two legacies of 10,000*l*.; or to one such legacy only: Secondly, whether the evidence could be read in opposition to her claim of two legacies.

The *Attorney General* [Sir John Mitford], *Solicitor General* [Sir William Grant], and Mr. Horne, for the Plaintiff. In cases of this sort, where it is so difficult to find the actual intention, it is necessary to resort to general presumption: not that it will always accord with the truth: but it is more convenient to abide by the presumption than to conjecture as to the intention, unless clearly marked by the testator. It is a settled presumption, that *prima facie* two legacies given

to the same person by the same instrument shall be held a substitution; but, if by different instruments, they shall be accumulative.

It is enough for this Plaintiff to state, that these two legacies are given by different instruments. It is not * necessary for her to state circumstances: but this case does not stand entirely upon the naked fact. It is not necessary, in order to raise the presumption, that the two legacies should be equal in amount: whether the latter is greater, less, or equal, it is sufficient. But two circumstances occur in this case, which weigh against the presumption of a substitution; though it is not necessary for us to have recourse to them: one; that it is evident, the testator thought an actual revocation necessary, when he intended it; for he expressly revokes the legacy to his son: secondly, the legacy given to his daughter by the codicil, not being a charge on the real estate, would not be so advantageous to her as that by the will. Arguing upon the intention, he certainly did not mean to put her in a worse situation; leaving her provision to chance, and the arrangement that might take place as to his property. Suppose, he had been asked, whether he meant to leave it liable to those accidents. There is no instance, that a worse legacy, given with less security for its payment, has been held a substitution for a legacy better secured. These instruments therefore afford no internal evidence against the Plaintiff's right to take under both.

The authorities are particularly noticed in *Ridges v. Morrison* (1), referring to the case of *Hooley v. Hatton* (2). This testator advertising to the disposition made by his will must have intended accumulation in this instance. The plain inference from revoking the legacy to his son and not revoking that to his daughter is, that his intention was different; and he meant her to have both. The other circumstance, that the legacy by the codicil is less advantageous, not being charged on the real estate, is very important; and has never occurred in any case. The will does not charge legacies given by any other instrument; as in *Brudenell v. Boughton* (3) and that class of cases. It is confined to legacies thereafter given. The last codicil is not executed according to the Statute of Frauds to affect land; and therefore cannot operate to charge the real estate. The consequence might be, that, unless the personal estate was sufficient, or a Court of Equity by marshalling the assets could provide a fund for this legacy, there might be no fund for it; and by holding that the codicil revokes the legacy by the will, the Court [* 373] will revoke by implication a legacy, for which there is * a fund on account of a legacy, for which there might be no fund. There is no instance of such a revocation, where the fund has not been the same. The internal evidence therefore arising upon the instruments themselves is strongly in favor of this as an accumulative legacy. If the testator adverted to both instruments, he

(1) 1 Bro. C. C. 389.

(2) 1 Bro. C. C. 390, n.

(3) 2 Atk. 268; see *Habergham v. Vincent*, ante, vol. ii. 204.

must have seen, that he had given the first legacy to her with maintenance, and charged upon his real estate; also, that he had made a subsequent specific disposition in favor of his son; which must necessarily have the effect of diminishing the personal estate; and upon which consideration he revoked the legacy to his son; at the same time not revoking the legacy to his daughter; but giving her a legacy, charged only upon his personal estate.

The evidence cannot possibly be read. Upon that point this case is not to be distinguished from any case, in which the introduction of evidence has been attempted for the purpose of giving interpretation to an instrument. The cases, upon the authority of which it will be attempted to introduce this evidence, are very different. In those cases the evidence was offered to rebut a presumption; and that lets in evidence on the other side. But it is now offered for the purpose of raising a presumption; to give an interpretation to the instrument. In *Coote v. Boyd* (1), it was admitted, to show, whether one instrument was not intended to be a substitution for the other (2); whether one of them was not meant to be blank paper: the same sort of question as in *The Duke of St. Albans v. Beauclerk* (3). The evidence was offered to rebut a presumption raised by the instruments themselves against the demand of double legacies: like the question between the executors and the next of kin as to a residue undisposed of (4). In this case the fact is with us: two legacies are given: and no presumption is required. In several instances the same specific thing has been twice given. The admission of evidence has been simply confined to cases, where a presumption may be raised against the words: there parol evidence has been admitted to rebut that presumption: but it has never gone farther. That was the ground in *Coote v. Boyd*, and in the cases between the executor and the next of kin.

In this case the evidence is offered purely upon the ground of the ambiguous sense, in which the word "presumption" is sometimes used. If the presumption, whether the word is properly *or improperly used, is in favor of the legal right, or of [* 374] the disposition made, no evidence can be admitted against such a rule, or presumption, if you will so call it: but if a presumption is raised by the Court from any circumstance in opposition to the legal right, or the apparent disposition of the party, there you may go into parol evidence, to show, it is not consonant to the truth. All the instances alluded to are illustrations of this distinction. In the case of the executor and next of kin the rule of law is, that *prima facie* the appointment of executor is a gift of the residue: but the Court raises the presumption against the legal right. So in the case

(1) 2 Bro. C. C. 521.

(2) See the Report, 2 Bro. C. C. 521.

(3) 2 Atk. 636.

(4) *Ante*, *Dicks v. Lambert*, vol. iv. 725, and the references in the notes, 727, and vol. i. 362.

of a portion (1) the Court raises a presumption against what is actually done, against the act of the party, that he only meant one provision, though in fact he has made two. Then the Court having raised the presumption permits it to be repelled: but the evidence is not admitted to raise the presumption, but to destroy it. But if instead of a pecuniary legacy to the same amount as the portion the testator had given the child only a share of the residue, that does not raise the presumption: which was determined by Lord Hardwicke in *Farnham v. Phillips* (2). In that case evidence would not be received; for it would be to raise a presumption. I (3) offered parol evidence of that kind in a very late case, *Freemantle v. Bankes* (4), in which it was contended, that a daughter should not take both under a settlement made by her father upon her marriage and a share of the residue under his will: but it was determined upon the case in *Atkins*, that the share of the residue was not a satisfaction for the portion; though it might turn out more: the Lord Chancellor holding, that neither can a residue be a satisfaction for a portion, nor a portion for a residue. The evidence was rejected, because it was not to rebut, but to raise, a presumption; and the two acts were permitted to operate; for the admission of evidence to show the intention would have been to construe the instrument. That is the purpose, for which evidence is offered in this case: to show, that the Duke of Leeds used the words in that supposed sense (5).

Upon the same principle the evidence was refused in *Brown v. Selwin* (6). It was offered in opposition to what the testator had *done, the disposition of a debt due from Mr. Selwin; to show he did not mean it, but used the words under a misapprehension of the law. No presumption had been previously raised by the Court from extrinsic circumstances; which that evidence was to rebut. So in this case it cannot be received to show, that two legacies by two different instruments shall not be considered as two legacies. It is produced against what the testator has done. If the Court can find upon the face of the instruments, that he meant only one legacy, it is well: but, to show that, extrinsic circumstances cannot be resorted to. All the cases support the distinction.

Mr. Mansfield, Mr. Piggott, and Mr. Romilly, for the Defendant. With respect to the evidence, the argument assumes, that this is not a case of presumption. Every book states it as a case of presumption. *Menochius de Presumptionibus* treats it so. In *Brady v. Cubitt* (7) this was much considered upon the presumption of law

(1) *Copley v. Copley*, 1 P. Wms. 147; *ante*, *Ellison v. Cookson*, vol. i. 100, and the notes, 112, 259.

(2) 2 Atk. 215.

(3) The Solicitor General.

(4) *Ante*, 79.

(5) *Hinchcliffe v. Hinchcliffe*, *ante*, vol. iii. 516, and the note, 530.

(6) For. 240.

(7) Doug. 31.

as to the revocation of a will by marriage and the birth of a child (1); and evidence was held to be admissible in answer to that. In this Court there have been cases without end, in which evidence has been admitted; and only one, *Fowler v. Fowler*, in which it was not admitted: the reason does not appear; for the same evidence has been admitted in many cases. In the case of the executor and the next of kin the parol evidence is admitted in favor of the legal right: but that is accident. It is not received, because it is in support of the legal right, but in answer to the presumption of an intention by the legacy to make the executor a trustee. That was much discussed in *Clennell v. Lewthwaite* (2). So in the cases of satisfaction the Court does not find the parent expressing in the instrument, that he intends a satisfaction; but presumes an intention to satisfy. So here is a presumption of intention. There is no such rule, as stated, that it is admitted in support of the act done by the party. No Judge has ever said so. There is no difference upon this sort of case between the rules of Law and Equity: only the question more frequently arises here.

These cases were much looked into in arguing *Fonnereau v. Poyntz* (3), a singular case. In *Cuthbert v. Peacock* (4) evidence was received to show, that a legacy was not a satisfaction of a * debt (5). In *Biggleston v. Grubb* (6) evidence [*376] was received contrary to what is stated by the Solicitor General as the rule. It was not to rebut the presumption, and so to support the act of the party, but against the will and disposition of the party, to show, the 500*l.* was a satisfaction. Unless this can be said not to be a case of presumption, the evidence cannot be refused; though, if it is a question upon the meaning of words, I admit, it cannot be received. It is impossible to say, this is not a question of presumption: for it is admitted, that if the two legacies are in the same instrument, the legatee is to have but one. Why? Because it is presumed, the testator meant to give only one. That is presumption, not interpretation. The distinction cannot be made as to this question between the same two sums given by two instruments and the same two sums given by one instrument. They resort to the rule of presumption; and then rejecting the evidence would defeat the purpose of the Court. They set up that rule of this Court, presuming in this case, that the testator means two different sums. The presumption of a *prima facie* intention is raised by this Court. That presumption must be liable to be repelled by evidence: otherwise the end would be sacrificed to the means. By receiving the evidence all the analogies and consistency of the Court will be preserved: by rejecting it the Court will get into inextricable confu-

(1) See *Gibbons v. Caunt*, *ante*, vol. iv. 840, 848, and the note.

(2) *Ante*, vol. ii. 465, 644.

(3) 1 Bro. C. C. 472.

(4) 2 Vern. 594.

(5) See *Chancey's Case*, 1 P. W. 408, and Mr. Cox's note; *ante*, vol. iii. 529, and the note.

(6) 2 Atk. 48.

sion. In *Ridges v. Morrison* Lord Thurlow qualified it according to our construction. It is not necessary for those to give evidence, who stand upon the rule of presumption. No evidence was offered there, as there was in *Coote v. Boyd* : but Lord Thurlow lays down the rule : so satisfied was he about it. *Coote v. Boyd* was reasoned throughout upon this ; that it was perfectly clear, the evidence could be given by those who stood, as this Defendant does : but Lord Thurlow even permitted it to be given in support of the double legacies. His Lordship's opinion upon that is very well and distinctly expressed ; and comprises the whole sense of the thing. The evidence, which certainly was admitted in that case, was to show, it was not a substitution, but an addition. That was more proper for the Spiritual Court. The meaning of the rule is, that in cases upon wills the object is the intention : but it is thought more convenient, that certain positive rules of construction should be established, whence the intention shall be inferred, which is not expressed. [* 377] Though the general object is to *get at the intention, yet it may defeat its end ; and an intention may be presumed contrary to the truth. Therefore it is, that evidence is received to show, the testator did not intend to do what the Court infers that he did intend, to prevent injustice arising from their endeavors to avoid it. *Brown v. Selwin* was decided upon the ground, that it was not a case of presumption. That was expressly stated, when the cause was before the House of Lords ; and it was admitted, that if it had been, evidence would have been admissible. In *Ulrich v. Litchfield* (1) Lord Hardwicke says, he was of a different opinion from *Brown v. Selwin*. It is certainly very difficult to show a distinction between that case and the case of the executor and next of kin. Lord Hardwicke also said in that case, that there are only two cases, in which parol evidence may be admitted ; to ascertain the person, where there are two of the same name, or, where there is a mistake as to the name ; and 2dly, the common point between the executor and next of kin : but that certainly cannot be relied on ; for there are the cases upon portions and many others.

But in this case there is quite sufficient upon the instruments themselves. It is argued, as if necessarily the codicil must revoke the will, or the Plaintiff is entitled to the two sums. They assume that : but there is a middle case ; that the testator did not mean to revoke the first legacy, or to change the security ; nor had in his mind to give another sum ; but that he intended only repetition : the application of that, which was general in his will, for after-born children ; of which none were then in existence. Their inference therefore does not follow. He did not intend to revoke the legacy to his daughter : but the true construction of these papers is, that as to this legatee they are but one instrument ; the latter being only an application, a destination, of the general provision in the former. It would therefore remain a charge upon the real estate. In *Allen v.*

(1) 2 Atk. 372.

Callow (1) all this was insisted on ; and your Honor held it only a repetition of the same thing, and one legacy ; but not a revocation. This is a repetition under very peculiar circumstances : a child coming into existence after the execution of the will. She was only a few weeks old, when the codicil was made : no direction *as to her maintenance by that. It consists but of one [* 378] sentence. Is this child then to have twice what the son or any other child was to have ? The presumption, if it is one, that the legatee generally in this sort of case shall have both, is greatly weakened in the case of a child ; for it is to be presumed with equal force, that the testator did not mean a double provision. The inference of an intention to revoke is drawn, not from the words of the instrument, but from the manner, in which it is executed. No inference as to the intention arises from that. The testator evidently made this short codicil without legal advice ; and it might have struck him, that the description of after-born children might be applied to children born after his death. The general intention as to the provision to be made for younger children is put beyond all doubt : the object being clearly to give each 10,000*l.* by way of fortune ; with the addition of the stock to his younger son. The argument supposes the testator to have given by the will to this daughter *nominatim*. The will and codicil are but one will ; and the sense is precisely the same. The doctrine from *Hookey v. Hatton* and those cases does not apply ; for the will gives no legacy to this daughter *nominatim*. The inference from the object and the nature of the instruments is much stronger than many, that the Court has raised, in order to get out of the rule ; and too strong to admit presumption.

The *Attorney General*, [Sir John Mitford], in reply. The expression of Lord Hardwicke with reference to *Brown v. Selwin* is to be taken, that he had been of a different opinion. In every case upon this point the evidence has been first admitted to rebut a presumption : here it is to raise a presumption ; which is impossible. The note of *Biggleston v. Grubb* is very short ; and the question naturally occurs, whether the evidence might not have been admitted in answer to evidence on the other side ; for it is impossible to conceive it necessary to assist Lord Hardwicke's judgment. That cause was heard upon the 16th of July, 1740 ; and in *Farnham v. Phillips* in 1741, reported in the same book (2), Lord Hardwicke refused to admit evidence under the same circumstances ; which must have been admitted, if *Biggleston v. Grubb* is, as stated. The cases are collected in the note to *Rachfield v. Careless* (3) by Mr. Cox ; who certainly considers the ground of admitting evidence to be to rebut a presumption. **Brady v. Cubitt* [* 379] is a case of precisely the same description ; where Lord Mansfield observes, that there is a technical expression for it ; re-

(1) *Ante*, vol. iii. 289 ; *Moggridge v. Thackwell*, i. 464, and the note, 466.

(2) 2 Atk. 215.

(3) 2 P. Wms. 158.

butting an equity. The evidence therefore can be offered originally only on that side, which insists, the presumption is contrary to the fact.

There is no ground in this will to infer, that the testator meant children born after his death, or had any conception of that sort in his mind, so absurd an idea, as that the Plaintiff should have the legacy, if born after his death, but not, if born the day before. Upon the Defendant's construction the instrument stands, having no effect whatever; giving nothing; but only making a declaration, ascertaining the person to take under the will. It is presuming, that the testator had not common sense. The real question is, whether there is sufficient to raise a presumption, that the latter legacy was intended to be in lieu of the former; that she was not to have the legacy by the will, but was to have that by the codicil; and then if there should be no personal estate, she could take nothing. The inference is, that he did not intend to revoke the legacy by the will; and there is not enough to presume, that the legatee should not have both: the instruments giving her both.

With respect to the consequence, if the codicil has the effect of a revocation, that the legacy will not affect the real estate, *Hone v. Medcraft* (1) is a direct authority, that the charge being confined to legacies by the will cannot extend to the legacies by the codicil. The ground of *Brudenell v. Boughton* was, that the legacies by the codicil were included under the general word "legacies:" the charge extending to all the debts he might incur, and all the legacies he might give; and Lord Hardwicke's argument expressly excludes cases, where the extent of the charge is specified; as in this case and *Hone v. Medcraft*.

May 18th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The question is, whether according to the true construction of the will and the third codicil, and under the circumstances, the legacy by the codicil is accumulative and additional; giving a second provision by way of portion of 10,000*l.* above that provided by the will. In the course of the cause evidence was offered on the part of the Duke of Leeds, the executor and residuary [*380] legatee; to prove, that the legacy was not *intended to be accumulative, from declarations by the testator as to the portions he intended for his younger children. An objection being taken to receiving the evidence, it was fully argued; and I confess I felt some doubt upon the point: but it occurred to me, that upon consideration of the question arising upon the will and codicil it might be unnecessary, if I should form my opinion upon the will and codicil, to come to any determination upon that point as to admitting the evidence; which I should be very glad to avoid; and I have satisfied myself, that upon the true construction of the will and codicil, and the circumstances, under which they were

(1) 1 Bro. C. C. 261.

made, there is no necessity to resort to evidence to support the construction of the executor; being of opinion, that this legacy according to the true construction of the will and codicil is not to be held accumulative, but is only a gift of the same portion and provision by the testator to his daughter by name, to which before she was entitled under the description of after-born children.

Being of this opinion, it is better for me to say little upon the evidence. I should have found great difficulty in admitting it. It does appear most clearly, if the Report is right, that Lord Thurlow in *Coote v. Boyd* thought it admissible on either side. His Lordship did admit it upon that side, upon which, if this Plaintiff is right, it was not necessary; for it is contended, that it is an established rule, taken from the Spiritual Court, that two legacies are accumulative, if given by two instruments. If that is a rule, I admit, I cannot raise a presumption by evidence against it; and I am inclined to think, it must be taken to be a rule. But in *Hookey v. Hatton*, from which that is taken, the authorities, from which that rule is deduced, had no idea but that evidence is admissible; and it is stated by the writers upon the Civil Law, that the legacies shall be accumulative, if by two instruments, unless the executor can show evidence to the contrary. If it is taken as a rule of this Court, it would be a violation of it to admit evidence to raise a presumption against it. I should therefore, if it is taken as a rule in this Court, be very unwilling to let in evidence against it, first for the executor. It was taken for granted in many cases, and even in *Hookey v. Hatton*, that it would be admissible; and in *James v. Semmings* (1) it seems from one passage in the Report, as if the Court doubted, whether parol evidence would not have been admissible; * though the determination was upon the [*381] instruments themselves, that they were not accumulative. I will say no more upon the point as to the admissibility of the evidence; only desiring to be understood not to give any opinion upon it whatsoever (a).

The question then is to be considered upon the will and codicil, taken together. First, this is the case of father and child; and I must conceive, unless the Court has been erroneous in establishing the rule of presuming against double portions, that is a very material ingredient. Upon the will it is clear, that was the provision the tes-

(1) 2 H. Black. 213.

(a) Where a certain presumption would, in general, be deduced from the nature of an act, such presumption may be repelled by extrinsic evidence, showing the intention to be otherwise. 1 Greenl. Ev. pt. 2, ch. 15, § 296; Gresley on Evidence, 210; *Hurst v. Beach*, 5 Madd. 360; *Coote v. Boyd*, 2 Bro. C. C. (Am. ed. 1844,) 520, note (a); *Richards v. Humphreys*, 15 Pick. 139; *Dewitt v. Yates*, 10 Johns. 156; *Wray v. Field*, 6 Madd. 300; *Mackenzie v. Mackenzie*, 2 Russ. 262; 1 Phil. Ev. (Cowen & Hill's ed.) 578, note, 1003, on iii. vol. ib. 1495, (ed. 1839,) and cases cited; *Timberlake v. Parish*, 5 Dana, 351; *Jones v. Mason*, 5 Rand. 577; *Mann v. Mann*, 1 Johns. Ch. 231; Fonbl. Eq. b. 4, pt. 1, ch. 1, § 5, note (b); *Ellison v. Cookson*, 2 Bro. C. C. (Am. ed. 1844,) 309, note (b); 2 Williams, Executors, (2d Am. ed.) 926, et seq.

tator thought sufficient for his only then younger child and any after-born children he might have. This being his intention, and his object to provide for his younger children, he soon after by a codicil gave to his son far short of what he had given him by the will, but a considerable addition to it: viz. his money in the funds. It seems then to have been his intention to give his son that in addition; leaving the will to operate as to the legacy. Afterwards thinking, he might not have sufficient, or, perhaps, that he had not so certainly secured that provision to his son, as might be, he creates a trust; which is only giving a real and specific security for the same portion: but having done that, and another child being born, he immediately recurs to his will; and to put an end to any doubt, whether that should be in addition, he makes a codicil, reciting, that he had otherwise sufficiently provided for his son, which was only by that charge, and revoking the legacy to him by the will; thereby declaring it not to be his intention, that his son should have the provision by the charge and also the legacy; meaning, that 10,000*l.* should be his only portion with that small addition by the prior codicil; and then he gives the sum of 10,000*l.* to his daughter by name.

It is said, this is a gift to the same person of the same sum in two separate instruments; and therefore *ex necessitate* it is an accumulation: but if I read this right, it is neither more nor less, than giving the portion to his daughter, as *persona designata*: she having come into existence after the execution, and not being mentioned in it *nominatim*, but being merely included in the description of after-born children. It is asked, why he did not revoke the legacy to her. He did not mean it. He intended that legacy to

[* 382] stand. Whether he took a wise way to put it out of *doubt is another question; which is sufficiently answered by the argument it has occasioned. But we must consider, what might have been floating in his mind. It might, as has been suggested at the bar, occur to him, that it might mean children born after his death; and possibly that is the sense, in which he meant it; and knowing, how critical lawyers are upon words, and thinking it necessary to guard against such a construction, he took that course, with a view to put it out of doubt. I will put this case; and no one can doubt upon it. Suppose, a testator by a will made before his marriage gave to any woman he might afterwards marry 2000*l.* a year by way of jointure; that afterwards he married; and then by a codicil gave his wife the same jointure: could it possibly be intended, she should have two jointures? This is almost exactly the same case. There are two provisions. I am not determining, and will not say, whether upon two provisions, one by will, the other by codicil, without the circumstances, that exist in this case, the rule would or would not attach; but it would be going too far to permit this rule to operate, when I am satisfied to the contrary; and that there is sufficient ground to say, the testator only meant a gift to his daughter by name of the same provision he before made for her as

one of his younger children. The Counsel for the Plaintiff, aware of the difficulty, that might be thrown in the way, asked, whether it is a revocation or a substitution. In the first case, as the legatee would lose the benefit of the charge upon the real estate, that difficulty would arise, if I should consider this either as a revocation or a substitution. But according to my idea it is neither the one nor the other; but only a declaration, that the Plaintiff should have the same legacy as was given by the will to his after-born children.

I have looked into most of the cases. One occurred to me, in which I was Counsel; *Heathcote v. Heathcote*, before Lord Kenyon, when Master of the Rolls, in 1786; in which I have got my brief, with the notes I took on the back of the arguments on the other side. The point, I perceive, was exactly that in this case; whether the subsequent legacy was accumulative or a substitution. I looked into the decree; and it was held accumulative. Lord Kenyon did certainly rely much upon the rule supposed to prevail in *Hooley v. Hatton*. This case was before *Coote v. Boyd* and the late cases: but it turned, as I conceive from my notes, upon the words of the *codicil themselves; by which it appeared, the tes- [* 383] tator intended them to be additional. Having made a small provision, considering his immense fortune, for the children by his marriage, namely, 15,000*l.*, he made his will; having then only one son born: therefore he made no additional provision for younger children. Afterwards he had three younger children; and then he made a codicil; as it is called: but I much doubt, whether he meant it to be testamentary, or only as a settlement to take place after his death; for there is not a word in it testamentary. His children then being very young, and he being possessed of the following sums of money, and stocks, (stating them) to the amount of 141,000*l.*, out of these sums he gives 50,000*l.* each to two sons, and to his daughter 25,000*l.*; and he directs the remainder to be divided share and share alike, unless there should be any other younger child alive or born in due time after his death; and he declared, that by that paper he revoked any other provision he had made for younger children, except the settlement itself; and that he had to that set his hand and seal; and he did sign and seal it. This was in 1774. Afterwards in 1783 he made a codicil; which he declares to be a codicil to his will, and directs to be taken as part of his will. He recites, that he had purchased several estates; and he charges all the estates purchased since making his will with the raising of the several legacies or sums of money after mentioned, limited to or in favor of his younger children after named. He then gave to his son John the legacy or sum of 45,000*l.*; to his son Robert the legacy or sum of 45,000*l.*; to Elizabeth, his daughter, 25,000*l.*; which was the same as he had before given given her; and to each and every other, that he might have, the legacy or sum of 10,000*l.*; and he directs, that they shall take these legacies or sums exclusive of and over and besides any portion or portions, sum or sums of money, which may be provided either by the settlement,

or by any deed or deeds, writing or writings, or by his said last will by him made and executed subsequent to his marriage settlement.

Upon this case Mr. Maddocks insisted, the word "writings" did not mean testamentary writings, but by way of deed. But he says, "by any deed or deeds, writing or writings, or by his said last will." He had given them no provision by his last will. I did not hear the judgment; which has been often quoted as strong in favor of accumulative legacies: but I think, it turned upon the ground I have mentioned.

[*384] * All the Judges, before whom this question has been, have decided, that small circumstances will raise an inference against this accumulation. This case, I think, affords a sufficient ground. Therefore, I am satisfied in declaring, that upon this will and codicil the Plaintiff is entitled only to one legacy of 10,000*l.*; but it shall be particularly mentioned in the decree, that evidence was offered, and not read, without prejudice to the question, whether it is admissible or not.

The decree stated, that, an objection, having been taken for the Plaintiff to reading the depositions of the Duchess of Leeds and George Brooks, Esq. in order to prove, that the Duke of Leeds did not intend to give the Plaintiff under the description of an after-born child a legacy of 10,000*l.* by his will and a like legacy by his codicil, dated the 14th of April, 1798, which was offered by the Defendant, the eldest son and sole executor of the testator, without hearing the said evidence read, but without prejudice to the question as to the admissibility thereof, the Court declared, that upon the true construction of the will and codicil, dated the 14th of April, 1798, the Plaintiff is not entitled to the provision of 10,000*l.*, given by the testator's will to each of his after-born children, and also to the legacy of 10,000*l.* given to her by the codicil, dated the 14th of April, 1798.

The decree directed the accounts to be taken; and that, in case the personal estate shall not be sufficient for payment of the debts, funeral expenses and legacies, any of the parties are to be at liberty to apply.

For the leading rules as to what legacies shall be deemed accumulative to, and what others as merely substituted for, previous gifts; as well as the admissibility of parol evidence, to repel a presumption against the intention of a double bounty; see, *ante*, notes 2 and 3 to *Moggridge v. Thackwell*, 1 V. 464, and note 3 to *Barclay v. Wainwright*, 3 V. 462. As to the presumption against double portions, and the admission of evidence to rebut that presumption; see the notes to *Ellison v. Cookson*, 1 V. 100, note 6 to *Blake v. Bunbury*, 1 V. 194, note 2 to *Barclay v. Wainwright*, *ubi supra*, and note 2 to *Sparkes v. Cator*, 3 V. 530.

LUSH v. WILKINSON.

[ROLLS.—1800, MAY 20.]

To impeach a settlement after marriage under the Statute 13 Eliz. the husband must be proved to have been indebted at the time, and to the extent of insolvency. (a) The creditor not producing any evidence, his bill was dismissed, with liberty to file another.

By indentures, dated the 31st of January, 1793; — Cawood, in order to make a settlement and provision for his wife Mary Cawood, conveyed certain leasehold premises *upon trust [*385] for himself for life; and after his decease to pay to his wife for her own sole and separate use an annuity of 50*l.* per annum for the remainder of the respective terms, if she should so long live; and as to the remainder of the rents and profits, and, after the decease of his wife, as to the said premises, upon trust for himself, his executors, &c.

He died upon the 11th of October, 1793. By his will, dated the 19th of August, 1793, reciting that he had lately settled upon his wife an annuity of 50*l.*, therefore he gave her one shilling.

The leasehold premises, upon which the annuity was charged, consisted of four houses; two of which were subject to a mortgage of 600*l.* and the other two to a mortgage of 250*l.* Upon the death of the testator his widow took possession; and received the rents and profits. The mortgagee for 600*l.* pressing for his money, she paid him off and took an assignment.

The bill was filed on the 3d of June, 1799, by a creditor of the testator against his executor and against the widow; praying an account of the personal estate, debts, &c.; and that the deed granting the annuity to the Defendant Mary Cawood may be declared fraudulent and void as against the creditors, as being voluntary; also, that an account may be taken of the rents and profits of the leasehold premises received by her.

The bill charged, that the deed was subsequent to the marriage; and that Cawood was then in insolvent circumstances, or was then indebted to several persons; the greatest part of which debts remained unsatisfied at his death; and that therefore the deed is void as against creditors.

The widow by her answer stated, that her husband being desirous of making some provision for her made the indentures of Jan. 1793; which were openly and *bona fide* executed for the purpose of making a provision for her, if she should survive. She denied, that he was insolvent at the time of making the deed or any other time; and stated, that beyond the two mortgage debts she believed he did not owe above 100*l.*; and none of such debts were due at his death; and his personal property considerably exceeded what he owed.

(a) See *post*, 387, notes (a) and (b).

The Defendant went into evidence to show, that her husband had been in good circumstances. No evidence was produced by the Plaintiff.

Mr. *Richards* and Mr. *Johnson*, for the Plaintiff. Mr. *Hall*, for the Defendant. In *The East India Company v. Clavell* (1), even though there were debts, yet under the circumstances it was held, that a voluntary provision for a wife may be good; as where the debts are trifling, and the property very large. The Statute (2) shows, it must be fraudulent, by the penalty and forfeiture imposed: from which the object is evident. It is clear, that if there were no debts at the time, it is good; the object to provide for a wife being meritorious; and in *Sagitary v. Hide* (3) it is laid down by the Court, that every voluntary conveyance is not therefore fraudulent; but a voluntary conveyance, if there was a reasonable cause for the making of it, may be good and valid, even against a creditor. Lord Mansfield thought, the Court had gone too far in setting aside voluntary conveyances, as being therefore fraudulent. His Lordship expresses himself very strongly in *Doe v. Routledge* (4): but he held, that it was absolutely necessary, there should be creditors. Lord Hardwicke in *Russell v. Hammond* (5) states *Bovey's Case* (6); and in *Lord Townshend v. Windham* (7) he lays down the general doctrine on the subject. In *Walker v. Burrows* (8) the circumstance of being indebted at the time is considered most essential (9). These cases underwent a very strict review by Lord Kenyon in *Stephens v. Olive* (10), a case precisely the same as this.

The circumstances distinguishing this case are, that there is no evidence of any debt except the two mortgages. The widow also stands in the character of a mortgagee upon her husband's estate; and there is no instance of relief prayed against a mortgagee without offering to redeem; which offer is not made by this Plaintiff. There was no secrecy in the transaction; and her husband cut her out of his will on account of this provision. It has been [*387] acquiesced * in ever since his death, above six years. There would have been property enough to have answered this demand, if the Plaintiff had called upon the executor in time; but he has suffered the executor to waste the property. The bill ought

(1) Gilb. Rep. 37; Pre. Ch. 377; see as to that case *George v. Milbanke*, *post*, vol. ix. 190.

(2) 13 Eliz. c. 5.

(3) 2 Vern. 44.

(4) Cowp. 705.

(5) 1 Atk. 13.

(6) 1 Ventr. 193.

(7) 2 Ves. 1.

(8) 1 Atk. 93.

(9) In *Montague v. Lord Sandwich*, 2d July, 1797, in Chancery, the Lord Chancellor held clearly, that there must be creditors at the time. See *Williams v. Kidney*, *post*, vol. xii. 136; *Battersbee v. Farrington*, 1 Swant. 106; *Holloway v. Millard*, 1 Madd. 414. Upon the Statute 27 Eliz. c. 4, as to purchasers, see *Brown v. Carter*, *post*, 862, and the note, 867.

(10) 2 Bro. C. C. 90.

to be filed by the executor, not by the creditor: *Elmslie v. M'Alay* (1).

Mr. *Richards*, in reply. The opinion of Lord Mansfield referred to was not given judicially. The executor could not file the bill with so much effect as a creditor; for as against the party himself or the executor representing him the settlement was good. In the case upon the will of the Duke of Newcastle (2), which was much discussed before your Honor upon other points, this point upon a voluntary settlement arose before the Lord Chancellor. It was pressed, that the bill should be dismissed: but the Lord Chancellor would not dismiss the bill merely on the ground, that the settlement was voluntary: but it remained before the Court, to see, whether the Duke was in debt, or not; with a view to see, whether it could or could not be established. I admit, the law is, as stated; that there must be a debt at the time: but in this case there ought to be an account, to see the state of the assets; and as the widow must be before the Court, to account for the rents and profits she has received, the Court will direct an inquiry, in order to prevent another suit.

MASTER OF THE ROLLS. You appear as a subsequent creditor; and desire an account, in order to invalidate this settlement by proving prior debts. I have great doubt, whether you have a right to come without proving any one antecedent debt. In *Stephens v. Olive* Lord Kenyon seems to think, that without an antecedent debt proved there is no such right. A single debt will not do. Every man must be indebted for the common bills for his house; though he pays them every week. It must depend upon this: whether he was in insolvent circumstances at the time. (a) It is very difficult to let the Plaintiff have a decree to keep the widow in Court; and yet I do not like to let her out without giving liberty to file another bill. It is very extraordinary for a subsequent creditor to come with a fishing bill, in order to prove antecedent debts (b).

(1) 3 Bro. C. C. 624; see also *Utterson v. Mair*, 4 Bro. C. C. 270; *ante*, vol. ii. 95, and the note, 96; *Doran v. Simpson*, iv. 651.

(2) *Lady Clinton v. Lord Robert Seymour*, *ante*, vol. iv. 440.

(a) Mr. Chancellor Kent, in *Reade v. Livingston*, 3 Johns. Ch. 498, referring to these remarks, says, "such a loose dictum, one would suppose, was not of much weight, especially as there is no preceding case, which gives the least countenance to it." But the language of the Master of the Rolls seems to have the countenance of many subsequent cases. See *Shears v. Rogers*, 3 Barn. & Adol. 362, and the cases cited in the next note; 2 Kent, (5th ed.) 442, note; 1 Story, Eq. Jur. § 356, note (2), *et seq.*

(b) In *Reade v. Livingston*, 3 Johns. Ch. 501, *et seq.*, it was held, that subsequent creditors might impeach the settlement on the ground of prior indebtedness, if they could show antecedent debts sufficient in amount to afford reasonable evidence of a fraudulent intent; they are not obliged to show the absolute insolvency of the person making the settlement. It is enough to show him to have been deeply indebted. *Parkman v. Welch*, 19 Pick. 231; *Jones v. Stubeys*, 5 Har. & John. 372; *Hudnal v. Wilder*, 4 M'Cord, 294.

The true doctrine as now held seems to be, that a voluntary conveyance is not *per se* fraudulent even as against existing creditors. And where there is no evidence of fraud in fact in the giving of the deed, nor any subsequent acts of the parties, from which fraud can be legally inferred, subsequent creditors of the

* Dismiss the bill against the Defendant Mary Cawood with costs; with liberty to file another bill (1); and let the account be taken against the executor.

1. SIR WILLIAM GRANT, M. R. observed, in *Kidney v. Cousmaker*, 12 Ves. 155, that the only surprise he felt at Lord Alvanley's decree in the principal case, was, that his lordship did not dismiss the bill absolutely, without giving leave to file another.

2. For the judicial interpretation put upon the statute 13 Eliz. cap. 5, namely, that, generally speaking, it renders voluntary conveyances void, only so far as they affect the claims of creditors at the time of the transaction; see, *ante*, note 7 in *Kidney v. Cousmaker*, 1 V. 436.

grantor cannot avoid the deed by showing, that the consideration expressed therein was not the true consideration. The question is one of fraud, in fact, for a jury. See *Bank of the United States v. Housman*, 6 Paige, 526; *Jackson v. Seward*, 8 Cowen, 406; *Jackson v. Peck*, 4 Wendell, 300; *Hopkirk v. Randolph*, 2 Brock. 132; *Van Wyck v. Seward*, 6 Paige, 62.

Where debts exist, fraud must appear; indebtedness is but a presumption of it, and may be explained. *Wicks v. Clarke*, 3 Edw. 58; *Bracket v. Waite*, 4 Vermont, 389; *Chambers v. Spencer*, 5 Watts, 404; *Posten v. Posten*, 4 Wharton, 27.

Voluntary conveyances made in consideration of love and affection seem to be void only when existing creditors are thereby delayed, hindered or defrauded, or when the conveyance is made with a view to impair the rights of subsequent creditors. *Gale v. Williamson*, 8 Mees. & Welsb. 405, 409-411; 1 Story, Eq. Jur. 359, note (1); § 362-366; 2 Kent, (5th ed.) 442, notes; *Salmon v. Bennet*, 1 Conn. 548; *Jackson v. Town*, 4 Cowen, 604; *Chamberlayne v. Temple*, 2 Rand, 384.

But in *Van Wyck v. Seward*, 6 Paige, 62, Chancellor Walworth held, that if a parent makes an advancement to his child, and honestly and fairly retains in his hands sufficient property to pay all his existing debts, the child will not be bound to refund, even though the parent does not pay his debts existing at the time of the advancement. See *Hinde v. Longworth*, 11 Wheat. 199; *Verplanck v. Sterry*, 12 Johns. 536; *Gilmore v. N. Am. Land Co.* Peters, C. C. 461. A very inconsiderable amount of debt would not affect the settlement, as to existing creditors. *Howard v. Williams*, 1 Bailey, Eq. 575, 585, note; *M'Elwael v. Sutton*, 2 Bailey, Eq. 128.

From the language of the judges in the case of *Shears v. Rogers*, 3 Barn. & Adol. 362, it seems, that a party must be indebted to the extent of insolvency to render his conveyance fraudulent within the statute of 13 Eliz. ch. 5.

If there is any design of fraud or collusion, or intent to deceive third persons in a voluntary conveyance, although the party be not then indebted, the conveyance will be held utterly void as to subsequent as well as to present creditors; for it is not *bona fide*. *Reade v. Livingston*, 3 Johns. Ch. 481; *Richardson v. Smallwood*, Jacob. 552; 1 Story, Eq. Jur. § 356; *Twyne's case*, 1 Smith, Lead. Cas. (2d Eng. ed.) note, p. 13; *Bennett v. Bedford Bank*, 11 Mass. 421; *Parker v. Proctor*, 9 Mass. 390; *Iley v. Niswanger*, 1 M'Cord, ch. 521; *Jones v. Stubev*, 5 Har. & Johns. 372; *Parlman v. Welch*, 19 Pick. 237; *Sexton v. Wheaton*, 8 Wheat. 229; *Benton v. Jones*, 8 Conn. 190; *Howe v. Ward*, 4 Greenl. 195; *Wadsworth v. Havens*, 3 Wend. 411; *Damon v. Bryant*, 2 Pick. 414; *Beach v. Catlin*, 4 Day, 284; *Merrill v. Meachum*, 5 Day, 345; *Stevens v. Olive*, 2 Bro. C. C. (Am. ed. 1844,) 92, note (a); *Carlisle v. Rich*, 8 N. Hamp. 44; *Thompson v. Dougherty*, 12 Serg. & R. 448; *Hesser v. Black*, 17 Martin, (Louis.) 96.

If a deed be set aside as fraudulent against creditors, subsequent creditors are let in. *Richardson v. Smallwood*, Jacob, 551.

See this whole subject thoroughly sifted and considered in the notes to 2 Kent, (5th ed.) 441-443; 1 Story, Eq. Jur. § 353-365; *Reade v. Livingston*, 3 Johns. Ch. 501; *Van Wyck v. Seward*, 18 Wendell, 392-405; *O'Daniel v. Crawford*, 4 Dev. Eq. 197; *Hanson v. Buckner*, 4 Dana, 254; *Mills v. Morris*, 1 Hoff. 419.

(1) See *post*, vol. xii. 155; *Holloway v. Millard*, 1 Madd. 414.

WHELDALE v. PARTRIDGE.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1800, MAY 20, 24.]

To convert real or personal property, as between the real and personal representatives, from the state, in which it is found at the death, the character of land or money must by the trust, covenant, &c. be imperatively and definitively affixed to it: otherwise, if there was an option, there is no equity. (a)

The bill by the heir, claiming property as real estate, was dismissed without costs, [p. 388.]

A question upon the rule "*possessio fratris*," &c. depending upon the implication of an estate for life, was not determined, [p. 388.]

By deed-poll, dated the 30th of March, 1790, reciting the marriage lately had between Edward Wilby and Susanna West: and that before the marriage Susanna West was seised in fee of certain lands in the county of Lincoln, devised to her by her father; and upon the request of Edward Wilby she had consented to the sale thereof, and had executed proper conveyances for that purpose: and in consideration thereof Edward Wilby had paid to Senior West in trust for him and Susanna, his wife, 1200*l.*, part of the money raised by the sale, to be disposed of as after mentioned: Edward Wilby and his said wife granted the said 1200*l.* to West, his executors, &c., upon the trusts and to and for the uses, intents and purposes after declared; and did consent and agree, that the same should be disposed of and applied accordingly: (that is to say), that the said Senior West, his executors or administrators, should lay out the said money in the purchase of lands and tenements, lying in the said county, of as good value as he or they could get for the same, as soon as conveniently might be, and should cause or procure such lands and tenements, when purchased, to be settled and conveyed to such use and uses, as they, the said Edward Wilby and Susanna his wife, should by any deed or deeds, writing or writings, under their hands and seals executed by them in the presence of two or more credible witnesses, direct and appoint; and for want of such direction and appointment then to the use of the right heirs of the said Susanna for ever; and it was agreed, that Senior West, his executors and administrators, should in the mean time until such purchase and settlement could be made, put out at interest the said 1200*l.* upon such security or securities as the said Susanna should approve in his or their names, and pay the interest thereof from time to time to the said Edward Wilby and his assigns during his life; and after his *decease then to pay and apply the principal [*389] money and interest in such manner as therein mentioned: (that is to say), in case the said Susanna should happen to survive the said Edward Wilby, then in trust that Senior West, his executors, or administrators, should after the death of Edward Wilby pay

all said money, as well principal as interest, unto said Susanna and her assigns, to be disposed of at her free will and pleasure; and in case said Susanna should die before Edward Wilby, and leave any child or children, then in trust that Senior West, his executors and administrators, after the death of Edward Wilby should apply and dispose of all the said money, as well principal as interest, for and towards the maintenance and education of such child and children, until he, she, or they, should attain the age of twenty-one years; and then the residue of such principal money should be equally divided amongst them: but if such child and children should have attained that age at the time of the death of Edward Wilby, that then Senior West, his executors and administrators, should pay said principal money, and such interest as should then happen to be in arrear and unpaid, to such child and children, to be equally divided amongst them, if more than one, or their legal representatives: but in case said Susanna should happen to die before Edward Wilby, and leave no child or children, then in trust that Senior West, his executors and administrators, should after the death of Edward Wilby pay said principal money and all the interest thereof unto such person or persons as she, said Susanna, should by her last will and testament in writing or by any other writing to be signed by her in the presence of two or more credible witnesses give and bequeath. and at such time and times as the said Susanna by such last will or writing should direct or appoint.

By the same deed Senior West covenanted to dispose of and apply the said 1200*l.* and interest upon the trusts and to the uses before declared; and Edward Wilby covenanted not to intermeddle or interrupt him in such application; and by a bond of the same date West became bound in the penalty of 2400*l.*, to be void, if he, his heirs, executors, administrators or assigns, should perform the covenants, &c. to be performed on his part by the said deed.

West in pursuance of the trust with the approbation of Wilby and his wife invested the sum of 1200*l.* in securities [*390] granted upon the *acre taxes under an Act (1) of Parliament for draining and improving the fen lands in the county of Lincoln; upon which that sum remained ever since. Susanna Wilby died in 1780 without issue; leaving her husband surviving; who died afterwards. No appointment was executed by will or otherwise.

The bill was filed by the devisees in trust and executors of West Wheldale, one of the co-heirs at law of Susanna Wilby at the time of her death; claiming a moiety of the trust money, as to be considered as land.

The whole was claimed by the executors of Edward Wilby on the ground that it vested absolutely in Susanna Wilby, and she had a disposing power over it: but as she had not executed that power, upon her death it vested in her husband.

Another question arose between Defendants as to the other moiety ; which was claimed by Susanna Hall upon the ground taken by the Plaintiffs, as only sister of the whole blood and heiress at law of William Lawson, the other co-heir of Susanna Wilby at the time of her death. A claim was also made upon that moiety by two sisters of the half-blood of Susanna Hall and William Lawson ; insisting, that they together with her, as being the only surviving children of William Lawson the elder, were with West Wheldale the co-heirs at law of Susanna Wilby at the death of Edward Wilby ; who was entitled to an estate for life ; and therefore the reversion or remainder to the heirs of Susanna Wilby could not take effect or fall into possession till his death ; and William Lawson the younger having died in the life of Edward Wilby was never actually seised of any estate of inheritance in that moiety.

The *Attorney General*, [Sir John Mitford], and Mr. Greenwood, for the Plaintiff. This transaction is very extraordinary : and the instrument is very defective : but the only way of giving sense to it is by reading both parts together ; and then the meaning is, that, if no disposition is made, it shall go to the right heirs at law of *Susanna Wilby, not to her next of kin ; and upon the [*391] disposition of the interest to Edward Wilby for life the intention must have been, that if the money should be laid out in land, he was to have a life estate. So, from the disposition to the children after the death of Edward Wilby it is to be presumed, that at all events he was to have it for his life. In case Susanna Wilby dies in the life of her husband, leaving no child or children, then it is to go according to her appointment by will or in writing : but no provision is made for default of such appointment ; and then the first limitation to her heirs is to take effect ; as if it had been laid out in land, according to the *prima facie* intention. The instrument is silent after the power of appointment. If the intention was, that her husband surviving her should be entitled as her representative, words to that effect would have been inserted : but, the instrument being silent in that respect, the only disposition in default of appointment is the disposition of it as land contained in the former part of the instrument ; and that is a rational settlement of the property ; which was real estate of Susanna Wilby, which she consented to sell for the accommodation of her husband ; retaining only this sum of 1200*l.* to be laid out in land. Though it has not been actually so applied, there is no ground for the implication, upon which the claim is raised against the heir ; which is prevented by the express direction to lay the fund out in land, with the ultimate limitation to the right heirs of Susanna Wilby for ever. That is the only limitation in this settlement, that exhausts the whole. If this fund had been laid out in land, and no appointment had been made, Mr. Wilby would have contended, that he was entitled to an estate for life, upon the evident intention from the whole instrument : if she had executed the power of appointment in his favor, he would have contended, that she had a power of appointment after his death.

In those cases then he would have contended for moulding the two parts of the instrument together. Otherwise the consequence would be, that, if it had been laid out in land, she would have lost her power of appointment. The clear meaning is, that she should have the sole power of appointment, subject to his life interest; whether it was to be taken as land or money; and the ultimate limitation was left by the framer of the settlement upon the preceding part; by which he conceived he had provided for that. The trustee is commanded to lay it out. It is not left to his option. The [* 392] direction is to do *it as soon as conveniently may be; and all this is to be in the mean time, until the money is so laid out. All the cases, in which it has been determined, that it shall be land or money, according to the circumstances, have been, where there has been an option to lay it out in land or personal securities: but those cases are not applicable to this argument; for this is a positive engagement; and the provision, that it may rest upon personal securities, is temporary only, with reference to the contingencies in the mean time. They meant, though she was under coverture, to give her the election to make it money; and if she should think fit to do so, the instrument points out the particular form. As she did not, the original disposition must stand. However absurd the intention, that it should be laid out both against the husband and the children, yet certainly that was the intention; and the absurdity disappears, when it is considered, that they were looking to the appointment, as the means of a reasonable provision among the children; and they thought that object secured.

Mr. *Mansfield* and Mr. *Alexander*, for the Defendant *Susanna Hall*, also contended, that this was to be considered land. Upon the question with her sisters of the half-blood: We certainly must contend, that the right to have the fund laid out in land accrued immediately on the death of *Susanna Wilby*. There is no authority for an implied estate for life in her husband. It was money arising from the estate of the wife, substituted in the place of it, with power to the husband and wife to appoint what uses they pleased of it as land; but no other use can possibly be raised by implication against the direct words of the deed. Upon this supposition *William Lawson* would have had actual seisin; and then without doubt his heir of the whole blood is entitled.

Mr. *Richards* and Mr. *King*, for the sisters by the half-blood of *William Lawson* the younger concurred, that this money was to be considered land. Upon the second question: This being considered as land, upon the true construction *Edward Wilby* was tenant for life; and then *William Lawson*, the heir of *Mrs. Wilby* at the time of her death, never had seisin, so as to make the sister heir. The general intention is to be presumed from the husband's having the interest for his life. It is impossible to give effect to every part of the instrument without giving him an estate for life at all events. The fund has not been laid out in land. The interest has been given to the husband during his life. How then can it be

said, that Lawson had seisin in his life; when in the event, and a necessary event, the husband had the interest for his life: namely, till the money should be laid out? There was no freehold in any person in the life-time of the husband; for he had the interest for life; and his life continued beyond that of Lawson. The consequence is, all these sisters must take as co-heiresses of Susanna Wilby, the person last seised.

Mr. *Graham* and Mr. *Short*, for the Executors of Edward Wilby. There is no right in any person to call upon this Court to change the property from that shape, in which it was at his death. There is no possibility at this moment of converting it into land for any of the purposes, which could be in the contemplation of the parties. The claim is set up by mere volunteers. There are no children. Though the instrument is not correct, it shows a clear intention. From the nature of the instrument there was clearly an option. It was competent to the husband and wife to elect to take it or apply it as money: if that is so, it is conceded, that it must remain money; for the whole argument goes upon its being an imperative trust. The object was very reasonable. Both parties at the time thought it most convenient to have it in the shape of money. Then looking to a future family, they considered, it might be most convenient to lay it out in land; and therefore a power was given to them to do so: but they did not mean that to take effect, if their circumstances should continue the same: so that it would be more convenient to keep it as personal property. The object, if it should be laid out in land, was, a settlement according to their joint appointment. The sentence is coupled by the word "and." Therefore a joint appointment is a necessary preliminary to the purchase; and there is no direction as to the rents and profits of the land, till there is such joint appointment. The deed has expressly provided for the disposition of this money in every event that could happen. In the event, that has happened, she took the absolute interest. *Robinson v. Dugale* (1). *Maskelyne v. Maskelyne* (2). A power to a man to dispose at his will and pleasure gives a fee. *Tomlinson v. Dighton* (3). As to the limitation to the right heirs of Mrs. Wilby, the only purport of that evidently is, that there was no farther limitation of it; that beyond the preceding limitation it was to be considered as undisposed of. See *then, how it is disposed of, [*394] when in the shape of money. The expression "in the mean time," &c. cannot mean a definite period, within which a purchase was to be made; for the deed goes on to provide for paying both principal and interest absolutely to the children. That expression means only, till they shall choose to make use of their option. The moment the purchase and settlement become inapplicable the bounds of the mean time become indefinite. The wife therefore never having called upon her husband or the trustee to

(1) 2 Vern. 181.

(2) Amb. 750.

(3) 1 P. Wms. 149.

lay out the money, she must be supposed to have meant the husband to take it, as she took it herself; and the question is precisely the same, as if she had left children. If there had been children, and the heir, after they had received their shares had called upon the trustee to lay it out in land, and call back what had been paid, it would have been impossible. In the event there is no direction in words: but there is irresistible implication. Having no children, it was natural for her not to make an appointment; knowing, that her husband, the only object, would take it.

In this case there is no Equity for the heir at law against the personal representative. The cases upon that point are very numerous. *Chichester v. Bickerstaffe* (1). *Curling v. May* cited in *Guidot v. Guidot* (2). *Symons v. Rutter* (3). The Court never considers money as land or land as money, except, where the direction or covenant is imperative and absolute. *Walker v. Denne* (4), which, underwent great discussion, shows, how little stress is to be laid upon the limitation to the right heirs. It shows only, that they do not know what to do with it; and meant to do nothing with it, unless a settlement should be made. The clear object of this deed was, that there should be no investment in land, till the destination of that investment should be marked out by the settlement. She was not confined to any particular mode; for she might have done it by letting her husband take the interest for life; the children taking the capital absolutely; and by not making any settlement she has made an option, that it shall remain *in statu quo*. This Court will not execute executory contracts for volunteers; though perhaps [* 395] they might * for persons, who might enter into the contemplation of parties, though remotely, as children of another marriage.

The *Attorney General*, [Sir John Mitford], in reply. The cases cited are perfectly inapplicable to this case. They are all cases of option; such as *Walker v. Denne*. Where there is a simple direction, and not an imperative trust, it shall be taken as found. *Chichester v. Bickerstaffe* was the case of an heir endeavoring to make the personal representative debtor; where all the trusts of the settlement were at an end before the death of Sir Charles Bickerstaffe. The debt was extinguished; and could not be revived for the heir. In *Pulteney v. Lord Darlington* (5) it was held, that the heir could not make the personal representative debtor simply for that purpose. But in *Lechmere v. Lechmere* (6) Lady Lechmere had a right to have it laid out; and the Court would not let her relinquish her right. The

(1) 2 Vern. 295.

(2) 3 Atk. 254; see also *Swann v. Fonnereau*, *Halliday v. Hudson*, *Croft v. Stee*, *Kennell v. Abbott*, *ante*, vol. iii. 41, 210; vol. iv. 60, 802; and other cases referred to in the note to the last mentioned case, 804, *u.*; *ante*, 303; and the notes, i. 45, 204: *post*, vol. vi. 198.

(3) 2 Vern. 227.

(4) *Ante*, vol. ii. 172.

(5) 1 Bro. C. C. 223.

(6) 3 P. Wms. 211.

question has always been, whether the trust was at an end or not. In *Symons v. Rutter* there was an express remainder.

In this case there is an express agreement, that the money shall be laid out in land as soon as conveniently may be. There is no control upon the part of the husband or wife. The instrument goes on to direct the uses of the land, when purchased. The power of appointment is of the land, when purchased: but they have no control over the purchase. The evident intention was, that this property should not go to the husband but by the act of the wife. Then the provision in the mean time, until this purchase and settlement could be made, imports, that it was to be made, as soon as it could be. Consider the nature of that provision. Why is the instrument silent beyond that limitation to the wife, considering it as absolutely bound by the previous direction? The ground of their claim is implication of intention, that this property shall go to the personal representative. If that had been the intention, there would have been an express declaration. The necessary implication is, that it shall go, as directed in the former instance: that is, to the family of the wife, and not of the husband. This case therefore is within the common rule. There was no option. The fund was to be laid out in land *according to the terms of the [*396] settlement; and the wife could have compelled it, if the husband had been unwilling.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am rather inclined with you. The only question is, whether the settlement itself has not in case of the wife's death turned this into money, and put an end to any claim of it as land. Nothing is so clear as that it must have gone as money, if there had been children. So during the husband's life, I think, the heir could not have had it laid out in land. The husband and children would have a right to receive it as money: but after his death, and when there are no children, I doubt, whether that did not change it, and give the heir a right to have it laid out. I will look into it.

May 24th. MASTER OF THE ROLLS. The question is, whether upon the true construction of this deed this sum of 1200*l.* is to be considered as land or money. In determining that question the only consideration must be, whether the character of land has been affixed to this property; so that the Plaintiff, as one of the heirs of Susanna Wilby, has a right to call to have this property conveyed to him, as heir.

The rules and principles, by which this case is to be decided, are so well known, and the doctrine was so much considered, and so fully discussed, in the very able argument of Lord Eldon in *Ackroyd v. Smithson* (1) that it is almost unnecessary to state them: but I will repeat the words of Sir Thomas Sewell in *Fletcher v. Ashburner* (2).

"Nothing is better established than this principle; that money

(1) 3 P. Wms. 22, Mr. Cox's note; 1 Bro. C. C. 503.

(2) 1 Bro. C. C. 497.

directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property, into which they are directed to be converted; and this, in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; * whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land (1)."

Nothing can be more clear than that principle; and the only question in every case similar to this is, whether the character of land or money is definitively or imperatively affixed to the property; or whether it is left as matter of uncertainty, in what manner the owner of the property intended it to descend. The question in this case therefore is, whether Edward Wilby and Susanna, his wife, have under the circumstances declared their intention, that this property should be land, and settled, with the ultimate remainder to the heirs of Susanna Wilby. All the cases were very fully considered by the Lord Chancellor in *Walker v Denne*; and the rule I have just considered, and taken from *Fletcher v. Ashburner*, was commented upon by his Lordship. I have now to decide, whether this character of land is imperatively and definitively impressed upon this fund; and whether under the circumstances it is to be so considered.

It is perfectly clear, that, if this money had been laid out in land during the life of the husband and wife, it must have been considered as real estate: but, I confess, it appears to me, that after her death it had no such character as land impressed upon it in such a manner as to entitle the heir at this time to call upon the Court to declare, that it was to all intents and purposes land. After her death it was to be received and enjoyed as money: if she survived, it was even to be received by her as money. I am therefore of opinion, the heir is not now entitled to come into this Court to convert the property, in order to give it a descendible quality, of which he is to have the benefit. If it should not be laid out during the joint lives of the husband and wife, there are evident marks of their intention, that it should be considered as personal property, and be received by her as such; and then it is a most extraordinary thing to say, her heir has a right to take it as a different species of property (a).

(1) 1 Bro. C. C. 499.

(a) In general, Courts of Equity do not interfere to change the quality of the property as the testator or the intestate has left it, unless there is some clear act or intention, by which he has unequivocally fixed upon it throughout a definite character, either as money or as land. It is said that there is not a spark of Equity between the heir and the next of kin as to the right of property in such cases. To establish a conversion, the will must direct it absolutely or out and out, for all purposes, not merely those of the devise, irrespective of contingencies and independent of all discretion. *Wright v. Trustees of Meth. Epis. Church*, 1 Hoff. 203; *Clay v. Hart*, 7 Dana, 11; 2 Story, Eq. Jur. § 1214; *Evans v. Kingsberry*, 2 Rand, 120; 1 Williams, Executors, (2d Am. ed.) 454, 455; 2 Kent, (5th ed.) 230, note.

According to the opinion I have formed upon this case it is not necessary to consider, what would have been the effect of the limitation; supposing this to be real estate.

The bill must therefore be dismissed: but certainly in [* 398] a case like this I will not dismiss it with costs, if I can avoid it. Take it as dismissed without costs (1).

The *Attorney General* [Sir John Mitford], observed, that in *Cranch v. Brisset*, where a bill was necessarily to be filed by some person, Sir Thomas Sewell ordered the costs to be paid out of the fund: though he felt himself obliged to dismiss the bill (2).

1. WHETHER, in all cases, where the limitations of uses in land, directed by a testator to be purchased with his personal assets, become united in the same individual who is entitled to, and has actual possession of, the testator's personal estate, the uses ought to be considered as discharged and merged; or whether the generality of that doctrine may admit some qualification; see, *ante*, the notes to *Rashleigh v. Master*, 1 V. 201.

2. As to the quality which a devised interest may retain, if a question arise between a testator's real and personal representatives; and the circumstances which may give to such devised interest the clearly impressed character of money, or leave it still clothed with a resulting trust for the heir as land; who, even if the conversion has been completed, may elect that the produce of such conversion, resulting to him shall remain impressed with the character of land; though, if he make no election, (and the conversion was not merely directed for a particular purpose which failed,) the resulting interest will devolve upon himself as personalty, and if the question arose between his representatives, would be considered as such; see notes 2 and 3 to *Kidney v. Coussmaker*, 1 V. 436.

3. That where a Court of Equity has directed a provisional sale of a testator's real estate, should such sale turn out to have been made unnecessarily, the Court

If land is directed to be sold for specific purposes, and they fail, it will go to the heir as real estate. Or if after such purposes are accomplished, a surplus remains undisposed of, the heir will be entitled to it. *North v. Valk*, C. W. Dud. Eq. 212; *Bogert v. Hertell*, 4 Hill, 492; 1 Williams, Executors, (2d Am. ed.) 455; *Hauley v. James*, 7 Paige, 213; S. C. 5 Paige, 318; *Estate of Tilghman*, 5 Whart. 44; *Snowhill v. Snowhill*, 1 Greenl. Ch. 30.

Where a testator directs his real estate to be sold and the mixed fund arising from the sale of the real and the personal estate to be applied to certain specified purposes, if any part of the disposition fails, then in proportion as the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir at law and as so much real estate in that event undisposed of. 1 Williams, Executors, (2d Am. ed.) 455, 456.

As to the doctrine of Equitable Conversion, see farther, *Craig v. Leslie*, 3 Wheat. 583, 577; *Beverly v. Peter*, 10 Peters, 532, 533; *Stephenson v. Yandle*, 3 Hayw. 109; *Leadensham v. Nicholson*, 1 Har. & Gill, 267; *Matter of Lord Lismore*, 1 Hogan, 177; *Marsh v. Wheeler*, 2 Edw. 156; *Amphlett v. Parke*, 1 Sim. 275; *Newby v. Skinner*, 1 Dev. & Bat. 488; *Anstice v. Brown*, 6 Paige, 448; *Van Vechten v. Van Vechten*, 8 Paige, 105; *Proctor v. Ferebee*, 1 Ired. Eq. 143; *Ram on Assets*, ch. 14, § 1, p. 204-209; *Bunce v. Vandergriфт*, 8 Paige, 37; *Fonbl. Eq. b. 1, ch. 6, § 9*, note (t); *Fletcher v. Ashburner*, 1 Bro. C. C. (Am. ed. 1844,) 497, and notes; *Hewitt v. Wright*, ib. 86-90, and notes; *Gott v. Cook*, 7 Paige, 534; *Kane v. Gott*, 24 Wendell, 660; *Rutherford v. Green*, 2 Ired. Eq. 122; *Reading v. Blackwell*, 1 Bald. C. C. 166; *Rhinehart v. Harrison*, ib. 177; 2 Kent, (5th ed.) 230, note; *Rashleigh v. Master*, *ante*, 1 V. 201, note (a); 2 Story, Eq. Jur. § 1212-1214; *Walker v. Denne*, *ante*, 2 V. 170, notes (a), (b).

(1) This decree affirmed upon a rehearing by Lord Eldon. *Post*, vol. viii. 227.

(2) See the note, *ante*, vol. i. 205.

without interfering with the title of the purchaser, will adjust the equities of the several classes of representatives; see note 3 to *Walker v. Denne*, 2 V. 170.

4. As to the resulting trust in favor of the heir, even when a testator has directed a conversion "out and out," but has not made a complete and valid disposition of the produce; see note 1 to *Halliday v. Hudson*, 3 V. 210.

WELLS v. PRICE.

[ROLLS.—1800, MAY 27.]

UPON a settlement of the fortune of a ward of the Court, who had married a man of no property, the Court took care to secure a provision for a future marriage. (a)

UPON the marriage of a female infant, a ward of the Court, the husband, having no property of his own, was ordered to lay before the Master proposals for a settlement of his wife's fortune (1).

By the settlement proposed the trust of the capital being confined to the children of the present marriage, it was directed to be varied in that respect; and that the trust, in case she should survive her husband, should be for all and every the children of the said Sarah by her present or any future husband; with a power to her to settle upon such after-taken husband, in case he should survive her, any proportion of the dividends, not exceeding one moiety thereof, for his life.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] observed, that upon such marriage of a ward of the Court, the whole fortune being her's, and the husband having nothing to settle, he never would allow it to be tied up to the children of that marriage; by which in case she has one child by him, he becomes a purchaser of her whole fortune for that child (2).

SEE, *ante*, the note to *Stevens v. Savage*, 1 V. 154, and note 1 to *Stackpole v. Beaumont*, 3 V. 89.

(a) See 1 Macpherson on Infants, (Lond. ed. 1841,) ch. 20, p. 202, 203.

(1) *Stevens v. Savage*, *ante*, vol. i. 154, and the note, 155.

(2) *Ante*, *Chassaing v. Parsonage*, 15; *Winch v. James*, vol. iv. 386; *post*, *Millet v. Rouse*, vii. 419. As to the extent to which the Court will go in providing for a second marriage, *Bathurst v. Murray*, viii. 74; *Halsey v. Halsey*, xi. 471; *Long v. Long*, 2 Sim. & Stu. 119.

HOLLOWAY v. HOLLOWAY.

[ROLLS.—1800, MAY 20, 29.]

TESTATOR bequeathed 5000*l.* in trust for his daughter A. for life, and after her decease for such child or children, as she shall leave at her decease, in such shares as she should think proper; and in case she shall die, leaving no child, (which was the event) then as to 1000*l.* for her executors, administrators, or assigns; and as to the remaining 4000*l.* in trust for such person or persons “as shall be my heir or heirs at law.”

The 4000*l.* vested in A. and the other two daughters of the testator, being his co-heiresses at law and next of kin at his death. If that union of characters had not occurred, *Quære*, whether the next of kin could not claim; and, supposing the heirs intended, what description of heirs, [p. 399.]

Prima facie words must be understood in their legal sense, unless by the context or express words plainly appearing, intended otherwise, (a) [p. 401.]

EDWARD REEVES by a codicil, dated the 21st of July, 1763, gave to trustees the sum of 5000*l.*; in trust to put the same out at interest on Government or other securities, and to pay the interest, income and produce, thereof to his daughter Hindes for and during the term of her natural life, separate and apart from her husband. The codicil then proceeded thus:

“And after the decease of my said daughter Hindes then upon this farther trust, that they, the said Augustine Batt and Benjamin Holloway, their executors or administrators, do pay the said 5000*l.* unto such child or children of my said daughter Hindes as she shall leave at the time of her decease in such shares and proportions as she shall think proper to give the same; and in case she shall die leaving no child, then as to 1000*l.*, part of the said 5000*l.*, in trust for the executors, administrators or assigns, of my said daughter Hindes; and as to the 4000*l.* remainder of the said 5000*l.*, in trust for such person or persons as shall be my heir or heirs at law.”

The testator died in 1767; leaving his daughter Susannah Hindes and two other daughters his co-heiresses at law and his next of kin at the time of his death. Susannah Hindes having survived her husband died without issue in August, 1798.

The bill was filed by the great-grandchildren of the testator by his two other daughters, the Plaintiffs being his co-heirs at law at the death of Susannah Hindes, against the representatives of the surviving trustee, and against several other persons, who with the Plaintiffs were the next of kin of the testator and of Susannah Hindes; praying, that the Plaintiffs, as co-heirs of the testator at the death of Susannah Hindes, may be declared entitled to the said 4000*l.*, &c.; or in case the Court shall be of opinion, that any other construction ought to be put upon such bequest, then that the rights of the Plaintiffs and Defendants may be declared, &c.

Mr. *Richards* for the Plaintiffs. The construction upon this codicil must be, that the testator meant his heirs at law at the

(a) 2 Williams, Executors, (2d Am. ed.) 788, 789; *Mouncey v. Blumirc*, 4 Russ. 386, 387; *Id. v. Id.*, 5 Mass. 500; *Mowatt v. Carow*, 7 Paige, 328.

death of his daughter Susannah Hindes. He meant the description of persons, that are in law the heirs; having before given to executors, administrators, &c. Mrs. Hindes must be necessarily known to be likely to be one of his heirs at law; and he gives this sum of 5000*l.* to her for life in contemplation of her surviving him; and it is clear, he did not intend, she should take any thing more than what he gave her expressly. He could not therefore mean, that his own heirs at law at the time of his death should take; knowing, that daughter would be one. He knew how to give to executors, administrators and assigns: then giving this sum of 4000*l.* in other words he gives it to those, to whom common usage and the law affixes the meaning of heirs at law.

Mr. *Martin* for the personal representatives of Benjamin Holloway, a grandson of the testator, contended, that the testator did not mean to confine it to heirs living at the death of the person entitled for life; but intended his own heirs generally.

Mr. *Romilly* and Mr. *Bell*, for the next of Kin of the testator. No case can be found at all applicable to this. The testator did not mean to give this sum of 4000*l.* to any person by description: but the Court must understand him to mean, that it shall go, as the law would give it. The construction must be, first, that he meant next of kin: secondly, the next of kin at the death of the person entitled for life. Speaking of a particular species of property he must be taken to mean heirs with reference to that property. Suppose, he had said "heirs at law of his personal estate," they could not take it with that descendible quality real estate would have. The only way to effectuate the intention is to suppose him speaking of persons existing at the time the fund becomes distributable; and then it means those persons, who shall be heirs at law (speaking inaccurately) of his personal estate.

There are many cases, proving, that it must mean persons at the death of the person entitled for life. The excepted cases are cases of children; in which the time has been referred to the period, when they want the portion; not, when it becomes distributable; which is the general construction; for wherever there is no other gift except the distribution at a particular time, it means persons answering the description at that time (1). Here *there are no words of gift speaking to any particular time except the death of Susannah Hindes.

Mr. *Richards* in reply. The whole frame of this will is providing for persons, that shall be living at the death of Mrs. Hindes. As to the 1000*l.* it was in the testator's contemplation that it should be paid after her death to some persons representing her. From that there is a fair inference, that the other sum was to be given to some person, who should be living at that time; and it is impossible to

(1) *Ante*, *Batsford v. Kebbell*, *Wadley v. North*, vol. iii. 373, 364; *Booth v. Booth*, iv. 399; *Monkhouse v. Holme*, 1 Bro. C. C. 208; *Benyon v. Maddison*, 2 Bro. C. C. 75.

contend, that he meant her to take it as one of his heirs at law. He knew how to give it to her, if he meant it. It cannot be supposed, he meant she should take any thing under this disposition of the 4000*l*. Whoever takes it must take by the bequest. It is not as the law gives it. "Heirs at law" are words of a distinct meaning; and as good a description as "next of kin." The natural sense of the words do not apply to next of kin.

The MASTER OF THE ROLLS observed, that the construction, that heirs at any other time than the death were intended, would require something very special; and that *Phillips v. Garth* (1) is like this case.

May 29th. MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This question arises upon a very doubtful clause in this codicil. Unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character (*a*). The only question is, whether upon the true construction of this codicil it must necessarily be intended, he did not mean by these words what the law *prima facie* would, strictly speaking, intend, heirs at law at the time of his death. A testator certainly may by words properly adapted show, that by such words *persona designata*, answering a given character at a given time, is intended. But *prima facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator. It is not like the case of *Long v. Blackall* (2). The words there put it out of *the power [*402] of the Court to put upon it any other interpretation; though it was much contended, that it meant at the death of the testator. In that case the word "then" plainly proved, that the personal representatives at the time of the death were not intended; and if that word had not occurred, there was a great deal to show, it could not be the intention (and that applies here); for there the wife was his executrix; and it would have been a strange, circuitous, way of giving it to her.

In *Bridge v. Abbott* (3) and *Evans v. Charles* (4) a great deal of discussion took place upon such words as these. In the first of these cases it was contended, and I had for some time little doubt upon it, that it was intended to give a vested interest to a party, who was dead before: but from the absurdity of that and of letting it be transmissible from a person, in whom it never vested, I was of

(1) 3 Bro. C. C. 64.

(a) See 2 Williams, Executors, (2d Am. ed.) 829, 830.

(2) *Ante*, vol. iii. 486; *Jones v. Colbeck*, *post*, viii. 38.

(3) 3 Bro. C. C. 224; [(Am. ed. 1811), p. 227, note (a).]

(4) 1 Anstr. 128.

opinion, that upon the true construction it must have been intended such persons as at the death of the testatrix would, if John Webb had then died, have been his personal representatives. I wish to add a few words to the Report of that case, to show, what the decree was. The Report states, that I declared the persons entitled as legal representatives to be the persons, who would have been entitled as next of kin to John Webb at the death of Mary King. I desire, that these words may be added: "in case he had at that time died intestate." I believe, those words were added in the decree.

The case of *Evans v. Charles* arose upon similar words, but under very dissimilar circumstances. Lord Chief Baron Eyre observes upon *Bridge v. Abbot*; and though the decision of the Court was different from mine, they seem to think my opinion right in that case. *Evans v. Charles* was determined upon other grounds; upon which the Court of Exchequer felt themselves obliged to give to the administratrix of the creditor. There is certainly an obvious distinction between them. It was truly said in *Evans v. Charles*, that it must always be taken together with the context. The words must have their legal meaning, unless clearly intended otherwise. In this case I was struck with the circumstance of the gift to the daughter for life, &c.; giving it to the heirs at law; of whom she would be one. But that alone would not, I apprehend, [* 403] *be sufficient to control the legal meaning of the words.

If an estate for life was devised to one, and after his death to the right heirs of the testator, it never would be held, that, though the tenant for life was one of the heirs, that would reduce him to an estate for life: but he would take a fee.

Long v. Blackall has that very leading distinction from this case upon the word "then;" that there could be no doubt personal representatives at a given time were intended. I must therefore hold, that, if that word had not occurred, the judgment of the Lord Chancellor would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.

In this case I cannot upon that ground alone, that the daughter named in the will was one of the heirs at law, hold, that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their *prima facie* construction: heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death (a). I have not put this construction upon it in order to avoid the difficulty, that would otherwise arise: but I am very glad, that this relieves me from the necessity of stating, who are meant by the words "heirs at law" as to the property, which is the subject of this bequest. This is personal property; and it is said, that though "heirs," &c. have a definite sense as to real estate, yet as to per-

(a) See *Ballard v. Ballard*, 18 Pick. 41; *Bowers v. Porter*, 4 Pick. 196.

sonal estate it must mean such person as the law points out to succeed to personal property. I am much inclined to think so. If personal property was given to a man and his heirs, it would go to his executors. I rather think, if I was under the necessity of deciding this point, I must hold it heirs *quoad* the property (a): that is, next of kin: but I am relieved from that; as, if heirs at his death are meant, they are the same persons: the three daughters being both heirs and next of kin; and if they did not take as heirs at law they took an absolute interest in themselves in the personal estate. Great difficulties would arise from the construction, that heirs at law are intended, and applying it to personal property. He might have different heirs at law: heirs descending from himself as first purchaser: heirs *ex parte paterna* and *ex parte materna*. I

* am inclined to think, the Court would in such a case consider him as the first purchaser; so as to take in both lines. However there is no occasion to say any thing upon that. [* 404]

Declare, that the words "heir or heirs at law" in this will must be taken to mean heir or heirs at law at the time of the testator's death; and that the sum of 4000*l.* vested in his three daughters (1).

1. For a statement of some of the leading rules as to the construction of testamentary instruments, and of the exceptions which those general rules occasionally admit in favor of a testator's intent, *ut res magis valeat quam pereat*; see, *ante*, notes 4, 5, 6 to *Blake v. Bunbury*, 1 V. 194.

2. That a bequest to a testator's "legal representatives," or a direction that his whole personal property shall pass "according to law," may, when an executor has been appointed, bear one interpretation favorable to the testator's next of kin, and another in favor of the executor; which ambiguity the Court will endeavor to resolve by a close examination of the whole context of the will; see the note to *Jennings v. Gallimore*, 3 V. 146; and that the same rule will be followed, where the testator has used the technical words "heir male," or "heir male of the body," but has so applied them, that if they were to receive their strict technical construction, his intent would be defeated; see note 4 to *Thellusson v. Woodford*, 4 V. 227. So the word "issue," which may be a word of doubtful interpretation, whether it ought to be taken as a word of limitation, or as a word of purchase, will, when the testator's intent can be collected by inference from his whole will, receive such a construction as may, consistently with law, leave the disposition operative; see notes 1 and 2 to *Hockley v. Mawbey*, 1 V. 143; the notes to *Everest v. Gell*, 1 V. 286; and note 5 to *Bristow v. Warde*, 2 V. 336.

3. For a qualification of the opinion expressed by Lord Alvanley, in the principal case, that if personal property were given to a man "and his heirs," it must go to his executors; see the note to *Lowndes v. Stone*, 4 V. 649.

(a) This is said to be the better opinion. 4 Kent, (5th ed.) 536, 537, in note; *Vaux v. Henderson*, cited in note to 1 Jac. & Walk. 388; *Ricks v. Williams*, 1 Bad. & Dev. 1; *Wright v. Trustees of Meth. Epis. Church*, 1 Hoff. 212, 213.

(1) *Loveday v. Hopkins*, Amb. 273; *Gwynne v. Muddock*, post, vol. xiv. 488.

LORD CARRINGTON v. PAYNE.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1800, MAY 23, 24, 30.]

DEVISE of real estates to trustees and their heirs, upon trust to convey upon certain trusts; and, subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise; and therefore extending to the estates to be purchased with the personal estate.

A subscribing witness to a will, disposing of real estate, being in Jamaica, his evidence was dispensed with, (a) [p. 404.]

Testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.*, given by the will: as to the effect of the codicil, *Quære*, [p. 405.]

RENE PAYNE by his will, dated the 23d of October, 1792, and attested by three witnesses, gave and devised all his manors, messuages, lands, tenements, hereditaments, and real estate, whatsoever and wheresoever, unto and to the use of Robert Smith, Samuel Smith, and Vicary Gibbs, Esqrs., their heirs and assigns, upon trust and to and for the intents and purposes after declared of and concerning the same: that is to say; as for and concerning all such tenements and hereditaments, as were vested in him in fee as a trustee or mortgagee, upon the same trusts; and as for and concerning all and every other his manors, messuages, lands, tenements, hereditaments, and real estates, whatsoever and wheresoever; upon trust, as soon as conveniently may be after his decease, to convey the same in such manner, that the same shall stand limited in the first place to his said trustees for the term of 99 years without impeachment of waste; and, subject thereto, as to the whole or competent parts of the same hereditaments and premises, to the intent that John Pearce may receive the annual sum or rent-charge of 300*l.* during his natural life; with all usual powers of distress and entry: and subject to the said term and charged with the said rent-charge, to Edward Pearce for life, without impeachment of waste; remainder to trustees,

(a) A person interested in the estate of the testator may insist on the production of the three subscribing witnesses to a will, at the probate thereof, if they be living and subject to the process of the Court. *Chase v. Lincoln*, 3 Mass. 236. If it be impossible to procure any one of the witnesses, or he has become incompetent, the Court will proceed without him *ex necessitate rei*, and resort to the next best evidence of which the case will admit. *Ib*; *Sears v. Dillingham*, 12 Mass. 358; *Brown v. Wood*, 17 Mass. 68; see *Swift v. Wiley*, 1 B. Monroe, 116; *Brown v. Chambers, Hayes*, Exch. 597.

In many cases, less strictness of proof is required. See *Hall v. Sims*, 2 J. J. Marsh. 511; *Overall v. Overall*, Litt. Sel. Ca. 503; *Harper v. Wilson*, 2 A. K. Marsh. 466; *Nalle v. Fenwick*, 4 Rand. 585; *Dan v. Brown*, 4 Cowen, 483; *Jackson v. Betts*, 6 Cowen, 377; *Jackson v. Luquere*, 5 Cowen, 221; *Powel v. Cleaver*, 2 Bro. C. C. 504; *James v. Parnell*, Tur. & Russ. 417; *Bomford v. Wilme*, 1 Beat. 252.

to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to William Pearce and his first and other sons in the same manner; remainder to George Pearce and his first and other sons in the same manner; remainder as a reversion in fee to the testator's youngest brother and his heirs.

The trusts of the term were declared to be, as to the several hereditaments and premises therein to be comprised, which shall be charged with the said rent-charge, for better securing the same; and as to the said hereditaments and premises, which shall be so charged, subject thereto, and also as to all and singular other the hereditaments and premises, so to be comprised in the said term, "that they my said trustees, shall and do collect the rents, issues, and profits, of my said estates, comprised in the said term of 99 years, for and during all such time as the said Edward Pearce shall be under the age of twenty-five years, and also for and during all such time and times as such other person and persons as for the time being shall by virtue of this my will be entitled to a present estate of freehold or inheritance in the same premises shall be under the age of twenty-one years, and moreover for and during all such time and times as such other person and persons, as for the time being shall by virtue of this my will be entitled to a present estate for life only in the same premises, shall be under the age of twenty-five years; but no longer:" and out of such rents and profits to pay and apply from time to time for the maintenance and support of Edward Pearce, until he shall attain the age of twenty-five, 1000*l.* per annum; and in case of his decease, then for the maintenance and support of such person and persons as for the time being shall be entitled by virtue of his will to a present estate of freehold and inheritance in the said premises, to be comprised in the said term, 300*l.* per annum until the age of twenty-one; and from that age, as to such as shall be entitled to a present estate for life only, 800*l.* per annum, until he or they respectively attain the age of twenty-five.

The will then directed, that all the rents and profits of his said estates, to be comprised in the said term, which shall be received by the trustees for such respective times as above-mentioned, and not applied in payment of the aforesaid annual sum, and in keeping the said hereditaments and premises in repair, shall be considered as a part of his personal estate, and be applied and disposed of as such. The will farther directed, that there should be inserted in such settlement to be made of his said estates, so to be comprised in the * said term, sufficient powers to enable Ed- [* 406] ward Pearce and the respective persons, who for the time being shall be entitled under his will to a present estate for life in his said tenements and hereditaments, so to be comprised in the said term, as aforesaid, to charge the same, but subject as aforesaid, by way of jointure, not to exceed 500*l.* per annum; and also by deed or will to charge his said estates or any part thereof, so to be comprised in the said term, for portions for younger children, not ex-

ceeding 5000*l.*, if but one ; 8000*l.*, if two ; and 10,000*l.*, if three or more ; also with power to Edward Pearce and the respective persons, who for the time being shall by virtue of his will be entitled to a present estate for life in his said hereditaments, so to be comprised in the said term, as aforesaid, and his trustees during the minority of the respective persons, who for the time being shall by virtue of his will be entitled to a present estate in tail, to grant leases. The testator also directed, that in such settlement to be made of his said estates there be inserted a sufficient power to enable his said trustees, if they shall think proper, to make sale of all or any part of his real estate in the county of Hertford ; and he declared his will, that the money to arise by such sale or sales shall be applied and disposed of in like manner as the clear residue of his personal estate is by his will directed to be applied. He then directed, that in such settlement to be made, as aforesaid, shall be contained conditions to oblige the respective persons, who for the time being shall be entitled to a present estate of inheritance in his said real estate, to be comprised in the said term, to take the surname of Payne.

The testator then gave to Martha Pearce all his household goods, furniture, &c., and effects, of what nature or kind soever, except securities for money or stock in trade in or about his houses in London and Hertfordshire. He gave to his executors 20,000*l.* upon trust to place it out upon Government or real securities, upon trust for Martha Pearce for life ; and after her decease to transfer to such one or more of John Pearce, William Pearce, and George Pearce, or such child or children of them or either of them, as she should appoint ; and, in default of appointment, equally between John,

William, and George. He also gave 5000*l.* to John [* 407] Pearce. He *gave 10,000*l.* to his executors, upon trust to place the same out in Government or real securities, upon trust to pay or allow for the maintenance and education of William Pearce, until he shall attain the age of twenty-one, such yearly or other sum or sums of money, as they or the survivor, his executors, &c. shall think proper : the surplus to accumulate for the person or persons entitled to the capital ; with power to apply any part of the capital for the advancement of William Pearce ; and the principal to be transferred to him at the age of twenty-one ; and a similar legacy, with the same direction for maintenance and accumulation, was given for the benefit of George Pearce ; with survivorship between them. He gave an annuity of 100*l.* a year to Mrs. Elizabeth Woodford during her life ; and the following legacies, among others : 500*l.* to each of his executors ; “ and to Mrs. Elizabeth Payne my mother Mrs. Elizabeth Payne my sister John Payne, Esq. and Edward Payne, Esq. my brother one hundred pounds each.” The will then proceeded thus :

“ And as to all the rest and residue of my personal estate of what nature or kind soever, and the surplus rents, issues, and profits, of my said real estates, so declared to be taken as a part of my per-

sonal estate, as aforesaid, after payment of my debts, funeral expenses, and legacies, I direct that the same shall from time to time, as convenient purchases shall offer, be laid out and invested in the purchase of real estates of inheritance in fee-simple; and that the estates so to be purchased shall from time to time be settled to such uses, upon such trusts, and in such and the like manner, as I have herein before directed respecting my real estates directed to be comprised in the said term of 99 years, or as near thereto as the deaths of parties and other circumstances will then admit of or render necessary, and in the mean time, until such purchase or purchases shall offer, my will is, and I do direct, that such rest and residue of my said personal estate shall be laid out upon good real or Government security at interest in the names of my said executors; and that the interest and dividends of the securities, wherein the same shall be invested, shall be paid and applied to such person or persons, and in like manner, as and to whom the rents and profits of my said real estates are by this my will, *and [* 408] the settlement to be made in pursuance thereof, directed to be paid and applied."

The testator then appointed his three trustees executors; and farther directed, that in the settlement to be made of his said real estate, as aforesaid, should be inserted all usual clauses, powers, &c.

By a codicil, dated the 24th of January, 1797, also duly executed to pass real estate, the testator reciting, that he had by his will given and devised all his manors, messuages, lands, tenements, hereditaments, and real estates, whatsoever and wheresoever, unto and to the use of Robert Smith, Samuel Smith, and Vicary Gibbs, upon certain trusts, and giving them certain sums of money, to be laid out and invested in their names upon certain trusts, and appointed them executors; and upon farther consideration it appeared to him, that the aforesaid trust and executorship may take up too much of the time, and break in upon Robert and Samuel Smith in their own weighty affairs and concerns; therefore he determined to leave them out and appoint Joseph Nutt joint executor and trustee with Vicary Gibbs; he revoked so much of the will as respected the appointment of Robert and Samuel Smith as trustees and executors; and constituted Joseph Nutt and Vicary Gibbs trustees and executors; and he gave and devised all his manors, messuages, lands, hereditaments, and real estates, by his said will devised to Robert Smith, Samuel Smith and Vicary Gibbs, to Vicary Gibbs and Joseph Nutt and their heirs, upon the trusts and to and for the same intents and purposes as the same hereditaments and premises are given and devised by the will; and he gave them all such sums of money, as are by his said will given to Robert and Samuel Smith and Vicary Gibbs, upon the same trusts, intents and purposes, as are by the will declared concerning the same; and he substituted legacies of 50*l*. each for Robert and Samuel Smith for the legacies given to them by the will; and gave Nutt a legacy of 500*l*. He directed the annual sum or rent-charge of 500*l*. to be limited and charged upon

his said estates for John Pearce during his life, instead of the annual sum of 300*l.*, by his will directed to be charged upon his said estates for him. He gave and devised to Gibbs and Nutt, and their heirs, a messuage lately erected by him at Sulby and the appurtenances, and all and every the messuages, lands, hereditaments and real estate, purchased by him since making his will, upon trust as to the house, &c., at Sulby and ten acres for Martha Pearce for 99 years, if she shall so long live and continue unmarried; and as [* 409] to all and every other the *messuages, lands, hereditaments, and real estates, &c., and the said house, &c., at Sulby, after the determination of the term, to settle the same in the same manner as by the will is directed concerning his manors and real estates thereby devised and given. Then, after giving an annuity and some legacies, in all other respects the testator ratifies the will.

The testator made the following memorandum;

"Memorandum January 25th 1797 to be considered and taken as a codicil to my will. The Mrs. Elizabeth Woodford of Wilford in Northamptonshire to whom by my will I have bequeathed an annuity of one hundred pounds per annum during her life was the widow of the late Mr. John Woodford of Wilford and is since dead; consequently the legacy is lapsed. I hereby annul and make void the legacy of fifty pounds bequeathed to my sister Elizabeth Payne."

This paper then gave two small legacies.

By a third codicil, dated the 30th of November, 1797, and attested by three witnesses, reciting, that he had by his will directed his trustees as soon as conveniently may be after his decease to convey, settle, and assure "my manors, messuages, lands, tenements, and hereditaments, and real estates therein mentioned; and in the settlement by my said will directed to be made of my said estates I directed, that the same estates should be limited after the determination of the preceding estates thereby directed to be limited and failure of issue male of Edward Pearce to the use of William Pearce for life," &c.

The codicil then, after stating the limitations in the will, proceeded thus:

"Now I do hereby revoke so much of my said will as directs the settlement of my said estates to the said William Pearce for life and all the subsequent limitations; and instead thereof do direct, that in and by the settlement to be made of my said estate, as aforesaid, the same estates to be limited from and after the decease [* 410] of the *said Edward Pearce and failure of issue male of his body to the following uses: that is to say, to the use of the said George Pearce" for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tale male; remainder in the same manner to John Pearce for life and his first and other sons, and then to William Pearce and his first and other sons, in tale male successively,

with the ultimate remainder as a reversion to the testator's youngest brother Edward Payne and his heirs. The testator farther directed, that all and every powers by his said will directed to be inserted in the aforesaid settlement of his said estates, should be inserted so as to operate in favor of the several persons aforesaid, according to the limitation hereby directed to be made of his said estates; and he gave and devised the estates purchased by him since the making his will to his trustees and their heirs, to be conveyed and settled in like manner, as by his will and this codicil is directed concerning the estates by his said will devised to them. In addition to 5000*l.* given by the will he gave John Pearce 1000*l.*, to be paid him within two months after the testator's decease.

The fourth codicil was not signed by the testator, or any witnesses; though there was a regular clause of attestation; and the blank for the date was not filled up. The Ecclesiastical Court however granted probate of this paper. It was very similar to the third codicil: the testator reciting and revoking the limitations of his will in nearly the same manner; but placing William Pearce and his issue next in remainder to George, and before John. The testator also cancelled a debt due to him (1).

Edward Pearce the testator's eldest natural son, died without issue in the life of the testator. The testator died in April, 1799, unmarried; leaving his three surviving natural children, William Pearce, George Pearce and John Pearce; and leaving his eldest brother John Payne his heir at law. Mr. Gibbs and Mr. Nutt renounced the executorship, and Robert Smith now Lord Carrington, took out administration with the will annexed.

The bill was filed by Lord Carrington, and by George Pearce, who had taken the name of Payne; praying, that the will and codicils may be established, &c. The principal question arose with respect to the fund directed by the will to be laid out in real

* estate; whether the third codicil, which in the direction [* 411] of the limitations postponed William to his younger brothers, extended to that fund. It was also claimed by the next of kin of the testator as undisposed of; upon the ground that the will, with respect to the uses of the real estate, according to which the estates to be purchased with that fund were directed to be settled, was revoked by the first and third codicils; and no disposition of the residue of the personal estate being afterwards made.

Another question arose upon the legacy claimed by the testator's sister Elizabeth Payne. The only legacy given to her was 100*l.* given by the will; and the second codicil annulled and made void the legacy of 50*l.* bequeathed to her.

A third point was made; whether, one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined.

(1) The Master of the Rolls expressed his dissatisfaction at the probate of this paper.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] held, that it was not necessary to have his examination; but it was the same as if he was dead; observing, that the heir at law did not make a point of it; but submitted it to the Court; and in *Mr. Fitzherbert's Case* (1), one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad.

The *Attorney General*, [Sir John Mitford], Mr. Mansfield, Mr. Steele, and Mr. Sutton, for the Plaintiff George Payne. The words "real estate" are used by this testator as a comprehensive term, referring to the compound mass, which he meant to go according to the limitations he has directed. The clear intention of the first codicil was to substitute Nutt as a trustee; and that the trustees should take the property directed to be laid out in land as well as the lands themselves. There is no express direction as to the residue of his personal estate: but it is manifest, that Gibbs and Nutt were to be the trustees to lay out that residue.

In *Darley v. Langworthy* (2) the decision was only, that the revocation of the disposition of the real estate was not a [* 412] consequential *revocation of the disposition of the personal estate. That case is different from this in one very material respect: that revocation consisted simply in the deviser's having done an act, the effect of which was to take from him the estate he had before, and to give him a new estate; upon which by law the will he had executed could not operate (3). It was therefore a legal revocation. The intention had nothing to do with that question; which was simply, whether the deviser had at his death that estate, which he had devised; and therefore, whether the will could operate upon it. Lord Camden considered the personal estate to be so attached to the real, that it must fall with that: but the House of Lords reversed that decree. The point did not in the least depend upon the intention. That case also occasioned great doubt in Westminster Hall.

In this case the question is simply, whether by the codicil the testator meant to separate his real and personal estates; that they should go different ways; to separate the rents and profits and the money to be produced from his Hertfordshire estate; and to make a different disposition of it, if sold, from that, which should take place, if not

(1) *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231; *Powel v. Cleaver*, 2 Bro. C. C. 499; *Wood v. Stane*, 8 Pri. 613. So, where one of the witnesses has become insane, proof of his hand writing is permitted: *post*, *Bernett v. Taylor*, vol. ix. 381; *Bootle v. Blundell*, xix. 494.

(2) Amb. 653; 7 Bro. P. C. 177; see *Southey v. Lord Somerville*, *post*, vol. xiii. 486.

(3) Upon that point the case is reported 3 Wils. 6. The law of revocation has lately been very fully discussed in the following cases: *Brydges v. The Duchess of Chandos*, *Williams v. Owens*, *Cave v. Holford*, *ante*, vol. ii. 417; [Am. ed. 1844, 417, note (a)]; 595, 604, note; iii. 650; *Goodtitle v. Otway*, 1 Bos. & Pul. 576; *Earl Temple v. The Duchess of Chandos*, iii. 685. The decrees in *Brydges v. The Duchess of Chandos*, and *Cave v. Holford*, were affirmed on appeal to the House of Lords. *Harmood v. Oglander*, *post*, vi. 199; viii. 106; see the note, *ante*, ii. 437.

sold; and that the personal estate should go one way, if laid out in the purchase of land, and the real estate should go another way. It is simply a question of intention, to be collected from the whole of the instruments.

The codicil was not intended as a total revocation of the disposition of the real estate. The term of ninety-nine years is left untouched: so are the limitations to Edward Pearce and his sons; the general charge in favor of John Pearce; the powers given to Edward Pearce to charge the whole accumulated property with portions, &c. The revocation is for a special purpose only; not an entire revocation; not an annihilation of the former disposition; but an alteration only, for the purpose of postponing William to George and John. Suppose, he had simply revoked the disposition in favor of William; and had made no other disposition: though the words are confined to real estate, could the Court have held William entitled to the real estate to be settled with the personal estate? Neither was there any alteration of the intention as * to Edward Payne, the [*413] testator's brother; which stands precisely as by the will.

It is therefore a mere alteration of the order, in which these persons are to take; and a revocation so far only as that purpose requires. Can it possibly be contended, that the personal estate is not disposed of? Suppose, he had directed, that in the settlement of the real estate devised by the will, the persons, to whom it stood limited, should have powers of making jointures, settlements, &c.: could there be a doubt, that the land to be purchased with the personal estate would be subject to those additional powers? Suppose, he had directed, that between the limitations to A. and B. another person should be introduced: could it bear a question, that the settlement of the land to be purchased was to include that limitation also? The personal estate being by the will directed to go to the same uses, it is of necessity to infer, that there should be a similar variation as to the land to be purchased. Great embarrassments will arise, if the words are considered to be confined to the real estate. The term for the accumulation of the rents and profits to be laid out in land runs over the whole. The accumulation from the personal estate and the produce of the sale of the Hertfordshire estate constitute part of the same fund. The codicil upon the most limited construction has disposed of a part of the fund; and in such a way, that it is impossible to separate it.

In *Mallabar v. Mallabar* (1) and the string of cases (2) of that description, the construction was, that the testator having directed the real estate to be sold and the produce of the sale to be applied in payment of debts, &c. having so far converted it into money, he must be intended to dispose of the surplus of the money under the general words disposing of the residue of his personal estate. So in this case the whole is made one fund for the purposes of the term

(1) For. 79.

(2) See the references in *Wheldale v. Partridge*, ante, 388, and the notes.

of 99 years, the powers, and the rent-charge to be secured to John Pearce : is it then to be taken as two funds in the subsequent disposition ? All is to be taken by reference to the disposition, directing the personal estate to be converted into real. The will and codicil for this purpose must be taken as one instrument. There is no possible doubt of the intention. They only go upon the want of words to comprise the estates to be purchased. The obvious [* 414] purpose was to leave this very large fortune in * succession to his different sons ; to make a family, as it is called. Nothing however is left to inference ; and therefore it is unnecessary to have recourse to such arguments. The construction of the Plaintiff is not at all strained. Can the testator be supposed to intend to give the estates to be purchased to William ; who is by the codicil to be postponed to George ? Is it to depend upon the pleasure of the trustees, whether the Hertfordshire estate is to be personal, to go to William, or real, to go to George ? What sense can be given to the direction, that all the powers are to remain ? The purpose was not to give double powers ; but that the powers before given were to remain. Upon the supposition, that two sets of limitations were intended, William might evidently become entitled under both : but in that case the powers of jointuring and charging were to have only a single operation. Many other embarrassments would arise. They must contend, if the codicil does not affect the uses farther than is expressed, that, though by the codicil George is preferred to William, yet the accumulation is to be during the minority of William, and the rents and profits are to go to maintain him, not George. So the powers would be totally different. In the direction for the settlement upon the uses of the real estates, or as near thereto as the deaths of parties and other circumstances will then admit of or render necessary, what could he mean by "other circumstances" but the very thing he has done ? There is an express provision as to the estates purchased, since the will was made, but not as to the estates to be purchased : the testator conceiving, that he had provided for them by the general words "real estate."

The case of *Lord Sidney Beauclerk v. Mead* (1), which will probably be cited against the Plaintiff, is not applicable ; and the reasoning of Lord Hardwicke puts it quite out of this case ; if the Court decides upon the intention ; which is so plain, that it is impossible to go against it.

The *Solicitor General*, [Sir *William Grant*], Mr. *Piggott* and Mr. *Romilly*, for the Defendant William Payne. This is a question of revocation, not of original devise. The right is clear upon the face of the will. They must show, how much is taken from William Payne by any subsequent instrument, either by express words or manifest intention. They assume, that it is incumbent [* 415] on the Defendant to *show negatively, that the testator's intention was not to give the estates to be purchased with

his real estates. That is not incumbent on the Defendant. He has only to answer the argument, that either by subsequent words, or by evidence, that the Court must act upon, and from which they can draw a clear and certain conclusion, that conclusion must be, that the estates are to go together. There is nothing to argue upon such a question as to the probability of his intention to keep his estate entire and the improbability of his intention to divide it. It is said, the words "real estate" in the codicil are sufficient to include both descriptions of real estate. But those words are manifestly confined in the use the testator makes of them. Throughout the whole will he has obviously distinguished between the real estates he had and those to be purchased. The words "my real estate" are never used with reference to the latter; but only, as in the outset of the will, when speaking of the estates he had: and that distinction is strongly marked in the disposition of the residue; where the two phrases "my said real estates" and "the estates so to be purchased" occur in the space of two lines. There is in the codicil nothing like an express revocation of the devise of the estates to be purchased. To see, what estates he there means by "said real estate" you must refer to the beginning of the codicil, reciting the conveyance directed of the estates he then had, and to be conveyed as soon as conveniently may be; having no aspect to estates to be purchased. Then the subsequent expression "my said estates" can mean only those specifically mentioned; which in the beginning of the will he directed his trustees immediately to convey.

If there is no express revocation as to this fund, can they find a clear intention of the testator to do that, which he has not thought fit to do in words? It is clear, he had his will before him; and he recites the very words of the preamble to the will in that of the codicil. He must have recollected, that he had directed one settlement to be made of the estates he had; and others to be made from time to time of the estates to be afterwards purchased. Would there have been any thing absurd in his separating these estates by the will? Suppose, he had been evicted from the estates he had: the devise of the estates to be purchased would have stood alone as a substantive and independent devise. These estates are not so connected together, as in *Darley v. * Langworthy*, [*416] as to raise an argument, that the disposition of the one fails by the determination of the right to the other. That argument from the connection of the estates was certainly very strong in that case: but where does that manifestly appear in this; so, that there can be no danger of mistake; in a case of separate gifts, in distinct parts of the will, to be the object of separate and distinct settlements? Does a clear intention result from the mere direction to settle these estates in the same manner? If so, the case in *Atkins* would not have been decided, as it was. In that case the estates were full as much coupled, as they are in this. There is very little difference in words, and none in meaning, between the cases. In

both the order of the disposition was a little altered, without altering the objects of the testator's bounty. The same arguments apply to both. There may be reasons for supposing an intention, that the estates should go together: but that will not do, if that intention is not sufficiently indicated; as Lord Hardwicke observes. As to the difficulties suggested, I deny, that they afford a rule of construction. We are discussing the intention of the testator; and in such a discussion these difficulties have no weight. Would they occur to an unlearned man? This testator never had it in his contemplation, that every thing was to be done by one settlement. There were necessarily to be more settlements than one. When the testator has copied the very words of the prior devise, it is torturing the words, and making a will for him by conjecture and inference, to suppose him to mean something else. The circumstances of *Darley v. Langworthy* were infinitely stronger for these arguments. The limitation of the leasehold estate was to be to the same uses. The two cases stand upon the same ground; and if in this the construction is to be different, it must always depend upon the mode. As to the alleged intention, where is the absurdity in giving George the real estates he had at the date of the will and those purchased between the dates of the will and codicil, and not taking from William the estates to be purchased with this fund? He provided maintenance for both of them. The safest course is to stand upon the words; unless the intention is demonstrated. It must not be forgot, that this Defendant does not seek to acquire an estate through a construction: but the Plaintiff seeks through a construction to take away an estate expressly given to the Defendant.

Mr. *Lloyd*, Mr. *Richards*, Mr. *King*, and Mr. *Leach*, [*417] *for the next of Kin. There is nothing but inference to support the claim of this personal fund as real estate: the uses of the will being revoked; and no disposition of the personal estate being made afterwards. To establish that claim would be going out of the will upon no ground, that can satisfy a Judge. The first codicil applies only to sums of money specifically mentioned in the will. This third codicil is confined to real estate only. There is nothing in it applicable to personal property: but every word is peculiarly applicable to real estate. Nothing is said about executors, or any other subject having reference to personal property; and he knew how to speak of it. The whole property was to be vested in securities in the names of the executors, till lands should be purchased. In that disposition the personal estate was so much involved with the real, that where the devise of the real estate fails by implication, the disposition of the personal estate must fail also. The effect is the same as if William was entirely removed out of the way. No instrument has given that personal estate; and therefore the next of kin are entitled.

The *Attorney General*, [Sir *John Mitford*], in reply. With respect to the claim of the next of kin, if money is directed absolutely to be laid out in land, and it is to have effect to any purpose,

the ultimate limitation must be to the heir at law; and the next of kin have no title. *Barker v. Gyles* (1). There is therefore no pretence for that claim. The whole of their argument consists of extreme refinement, depending upon particular words: that of the Plaintiff is founded, not upon particular words, but upon the view of the whole intent, to be collected from the several testamentary instruments. What Lord Hardwicke says in *Fuller v. Hooper* (2) must never be forgot, that a will is to be considered in two lights; as to the testament, and the instrument; and confounding them will introduce continual embarrassment. The will and codicils altogether make one testament. That was determined in *Crosbie v. Macdoul* (3).

The general impression on this testator's mind was to devise the real estates he had in this manner, so as completely to disinherit his heir at law in favor of his natural children, and to give the ultimate remainder in fee to his younger brother. It certainly was *his intention, that so much of his personal estate as [*418] should not be exhausted by particular dispositions should be laid out in land, to be settled in the same way; and that intention to give all this property both real and personal in the same way, clearly continued. With respect to *Darley v. Langworthy*, Lord Camden's opinion was the consequence of an improper use of the term "revocation." It seems to be an inaccuracy of language; and Lord Hardwicke upon those subjects distinguishes between virtual and express revocations (4); meaning by the latter expression instruments in their nature testamentary; and by the former those acts, which in the nature of the thing prevent a testamentary instrument from having its operation. In the latter case the intention has often nothing to do with it; as in the case of a recovery suffered (5). It has the effect, as Lord Hardwicke says, of virtual revocation; whether there was an intention to revoke, or not; for the estate no longer remains. The testator is just in the situation of a person evicted. By eviction the devise fails. Perhaps the eviction may be by a bad title: but in case of death before re-entry the will can have no operation; and preventing the operation of the will it may be called a virtual revocation; but has nothing to do with the intention. So in the case of a mortgage; which is a revocation *pro tanto* (6). If the mortgage is in fee, and a foreclosure follows, there is an end of the devise; but there is no change of intention. So in the case of a renewal of the lease specifically disposed of by the will, the ground is the same (7).

(1) 2 P. Will. 280; 3 Bro. P. C. 297; *Wheldale v. Partridge*, *ante*, 388.

(2) 2 Ves. 242.

(3) *Ante*, vol. iv. 610.

(4) See this distinction discussed in the argument of Lord Chief Justice Eyre, in *Goodtitle v. Otway*, 1 Bos. & Pul. 576; also stated in *Cave v. Holford*, *ante*, vol. iii. 650.

(5) *Dister v. Dister*, 3 Lev. 108; *Marwood v. Turner*, 3 P. Will. 163.

(6) The last case upon this point is *Earl Temple v. Duchess of Chandos*, *ante*, vol. iii. 685.

(7) *Marwood v. Turner*, 3 P. Will. 163.

The inference from the change of executors is, that the same persons should make the settlement of the land to be purchased and of the real estate he had; and that, when he had given that direction as to the real estate, he had done all, that was necessary to show his intention: and he considered the same disposition of the estate to be purchased as consequential. Can it be supposed, he had not an intention, that Mr. Gibbs and Nutt should transact every thing as to his personal estate; and not the two Mr. Smiths?

[*419] * When speaking of his will he means, not the first instrument only, but the testamentary disposition he has made.

It cannot be conceived, that, when he was using the word "revocation" in the third codicil for a particular purpose, a mere substitution in point of order, his intention was totally changed. There is not the slightest variation of intention as to his brother Edward Payne.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. During the progress of this argument I sent for the Register's Book for the purpose of examining the case in Atkyns: but unfortunately the decree does not appear to have been ever drawn up. However, if I take a right view of this case at present, neither the case in Atkyns nor *Darley v. Langworthy* will be necessary for my consideration, for at present I think it a mere substitution, and no revocation at all.

May 30th. The MASTER OF THE ROLLS having stated the case delivered the following judgment.

The real and personal estates are by the will united, and made into one settlement; by which these persons are to take in the course of succession marked out. Upon the first codicil some question arises; but none, that is material, in the view I have of this case. The question upon that codicil is, whether the words "sums of money" therein contained are sufficient to comprise the personal estate, or are confined to the sums of money specifically mentioned in the will. The principal object of the codicil was to devise estates purchased after the date of the will to the same uses. Upon the disposition by that codicil of all such sums of money, as are by his will given to his trustees, upon the same trusts, it was contended on one hand, that these words were not intended to comprehend all his personal estate comprised in the will: but relate solely to such sums of money as the testator had ordered to be invested in the names of trustees, for the particular trusts mentioned in the will. That argument is founded upon the idea, that as he had by the will expressly mentioned his personal estate, and given directions concerning that, as well as concerning his real estate, and by the codicil revoking the devise as to the real estates, and saying nothing as to his personal estate, it must be intended, he did not mean to advert to his personal estate at all. Upon the view I have of this case that criticism upon this first codicil is of no great consequence. I am rather inclined to think it was intended by those words to compre-

hend all the personal estate: but upon my opinion of the case it is not material to determine that; for if those words did comprehend all, they were inserted, in order to give it to the same trustees, who took the other property; and, as I think, that codicil only changed the trustees, and gave the estates purchased after the execution of the will to the same uses, it is of no consequence to determine that point as to the extent of those words.

The third codicil, upon which the question arises, revokes the limitations of the will; and substitutes George for William, John for George; and puts William the last in the intail; with the like remainder to the testator's brother in pretty nearly the same words. The codicil then goes on to direct the same powers to be inserted in the settlement of his said estates, and to direct estates purchased since the execution of the will to be settled in the same manner. It was contended on one hand, that upon the true construction of the will and the third codicil the testator must be held to have revoked the devise, so far as respects the real estate; by which I mean the estates, of which he was seised at his death; and to have made other limitations instead of them; but that he left the estates to be purchased with the personal estate to go to the same persons, and in the same order, as by the will he had given the real estate; and the words of the codicil are criticised, in order to show, that they cannot mean the estates directed to be purchased; and for that the case of *Lord Sidney Beauclerk v. Mead* was relied on. That case is in some circumstances analogous to this; and, when it was first mentioned, I thought that case and *Darley v. Langworthy* bore much upon it; but upon very full consideration I think myself relieved from the necessity of entering into many of the arguments upon these two cases; for I think, they are perfectly different; and the questions that arose in them, are not the questions, that will govern this decision. It was said, that, when one species of property is devised in a particular manner, and in the same will another species of property is declared to be annexed to it, as it was in the case of *Darley v. Langworthy*, or, where it is given to the same persons as the other estates, and by act of law or by codicil the disposition of the former is revoked or altered, the latter shall not be revoked or altered, unless it is manifest, the testator intended to affect that. I am willing for the sake of argument to admit this: but it does not in any way affect this case. I admit, the testator does not by these words include *the lands to be purchased; and [* 421] if by the will he had given to certain persons the lands he was seised of, and had by that will directed his personal estate to be laid out in land for the benefit of the same persons, to whom the real estate was devised; and by a codicil he had given the estates, of which he was seised, to different persons, and in a different manner, and had used no words applicable to the personal estate, the codicil might upon those two cases have the effect of disuniting them; and the personal estate would have gone to the same persons, as if the codicil had never been made. That is the effect of *Lord*

Sidney Beauclerk v. Mead. It was argued, that the codicil in this case does not include the personal property to be laid out in land ; and then considering the codicil as a revocation of the devise of the real estate, as it is silent with respect to the personal estate, that must upon the authority of those two cases go exactly as if that codicil had not been executed.

But none of these arguments apply to this case ; for this codicil does not revoke the devise of the real estate. It leaves the devise of the real estate to the trustees in full force. It does not in any degree disunite the estates to be purchased from the settlement to be made of the real estate. It is therefore fallacious to argue, that it was a revocation of the devise of the real estate at all. It remains devised to the trustees ; and the only alteration is in the mode of succession to be directed in the settlement to be made. The will directed a settlement to certain uses ; and gave the personal estate, to be laid out in land, to be settled to the same uses. Upon the first codicil it is not contended, that any alteration was made in the settlement of the testator's real estates, or those to be purchased. That codicil did nothing more than change the trustees, and devise the estates purchased after the execution of the will to the same uses. Therefore upon that codicil the real and personal estates are united ; and are to be conveyed to the same uses, by the same trustees ; and so it stood when the third codicil was made. By that codicil the testator revokes the limitations in his will as to the real estates, of which he was actually seised ; and limits new uses thereof ; and then upon the part of William, the second devisee in the will, Edward, the eldest son, having died after the third codicil was made, it was contended, that the uses of the estates directed to be purchased remained exactly as in the will. For the next [* 422] of kin it was contended, that * the uses limited by the will having been revoked, and the personal estate not being afterwards disposed of, it is undisposed of ; and therefore they are entitled. I am of opinion, that neither the arguments for William Payne, nor those for the next of kin can prevail ; for the will is not revoked, as to the union of the two species of estates. The codicil makes no alteration with regard to that union ; and though the testator makes use of the word "revoke," the will is not a revocation as to that union, but merely an alteration of the order of the limitations to be inserted in the settlement ; and it is no more than if the deviser with his own hand had inserted the name of George and John before William, and then republished his will. The codicil leaves the will in full force with regard to every thing not expressly or by necessary inference revoked or altered ; and I am clearly of opinion, that the settlement, as far as respects the union of the estates, remained in full force.

It is unnecessary to comment upon the two cases, that have been mentioned. If I was to argue upon this case, as Lord Hardwicke did in the case before him, the arguments, that were urged for the Plaintiff are exceedingly strong. It was admitted, the devise to

Edward will comprehend both the real and personal estates. The settlement to be made must be a settlement of both, in order to comprehend him. Certain powers are given to the tenant for life, affecting and riding over all those estates. Upon the construction of the Defendant these estates must after the death of Edward be comprised in two separate settlements. The difficulties then are almost insurmountable. Are there to be double powers: or, are the powers to cease? The power to sell the Hertfordshire estate, and many other arguments, very ably urged, and ably answered, I admit, are sufficient to show, the testator meant to unite both the real estate, of which he was seised, and the estates directed to be purchased; though, I admit, the words "my real estate" can apply only to those he had. But the ground, upon which I rest, is, that the will is not revoked by the codicil; which makes no alteration but in the order of limitation in the settlement to be made; and does not alter the devise. Suppose, another natural son had been born: and the testator had thought fit to interpose him after the others; and had used the expression, that he revoked the limitation to his brother; and directed a limitation to that son for life, &c.; upon the same * ground it might be contended, that totally re- [* 423] voked the disposition as to the estates to be purchased.

With respect to the legacy to the testator's sister Elizabeth Payne, I do not know what to make of it. I can find nothing similar to it. The Court is to give effect to every word of a will, if they can (a). How do I know, he did not think, he had given two legacies of 50*l.* instead of 100*l.*? But I am rather inclined to think, it is a mistake of the *quantum* of the legacy, and a demonstration of his intention to revoke the legacy given; thinking, he had given her a legacy of 50*l.*; and meaning to revoke that (1). I will consider of it.

The decree declared, that the residue of the personal estate of the testator and the savings and accumulations of the rents and profits of the real estates, which passed by his will and codicils, until the Plaintiff George Payne shall attain the age of twenty-five, ought to be laid out in the purchase of real estates in fee simple, to be settled to such uses and upon such trusts as the estates devised, which passed by the will and codicils, are directed to be settled; except so far as the same are varied by the third codicil to the will.

The point as to the legacy does not appear in the decree to have been determined.

1. THE execution of a will, disposing of real estate, is to be proved by the subscribing witnesses, if they are alive and can be produced. On a trial at common law, all the circumstances may be proved by a single witness; provided there were actually three witnesses to the execution, as the Statute of Frauds directs. *Ansley v. Dowling*, 2 Str. 1254. But although the devisee need not call more than one witness, the party opposing the will may call the other subscribing wit-

(a) *Dawes v. Swan*, 4 Mass. 208; *Parsons v. Winslow*, 6 Mass. 169; 2 Williams, Executors, (2d Am. ed.) 793.

(1) *Ante*, *Parsons v. Parsons*, vol. 266, and the note, 267.

nesses; however, notwithstanding one of the witnesses should refuse to swear that he saw the testator publish his will, still, if the fact can be proved by other sufficient testimony, the fraud or obstinacy of the refusing witness will not be suffered to defeat the testator's will. *Dayrell v. Glascock*, Skinner, 413; *Pike v. Badmering*, cited 2 Str. 1026. In the Court of Chancery, it is the general rule, never to establish a will unless all the witnesses are examined; because the heir has a right to evidence of his ancestor's sanity, at the time of the execution of his will, from every one of those whom the statute has placed round a testator at such a time, as guards against fraud. This is not a mere technical rule. The design of this provision of the statute was to prevent wills which ought not to be made; and it often operates silently, but forcibly, by intestacy: *Hindson v. Kersey*, 4 Burn's Eccles. Law, 91; *Bootle v. Blundell*, 19 Ves. 500; *S. C. Coop.* 138: but although the general rule of the Court of Chancery is, that all the subscribing witnesses must be examined; (*Townsend v. Ives*, 1 Wilts. 216; *Ogle v. Cook*, 1 Ves. Sen. 177;) it would be laying down that rule too largely to say, that in no case can a will be proved in Equity without such complete examination. *Powell v. Cleaver*, 2 Brown, 503. It was determined long ago, and the doctrine has been recognized in modern times, that when the best endeavors have been used to discover, and bring forward, a witness; if those efforts are fruitless, the witness may be considered dead. *Anonymous case*, Godbolt, 326; *M'Kenire v. Fraser*, 9 Ves. 6. It is with this qualification we must understand the rule, that the proof of the death of an attesting witness must be *positive*. *Bishop v. Burton*, Comyn, 614; and see *Burrowes v. Lock*, 10 Ves. 474. It was also decided in *Wood v. Stane*, 8 Price, 615; as well as in the principal case, that an exception to the general rule was reasonable when one of the witnesses was proved to be in the West Indies. The rule would be, in like manner, relaxed, if it appeared, that one of the witnesses was, owing to any other cause, not amenable to the jurisdiction of the Court: *Fry v. Wood*, 1 Atk. 445: this last circumstance, indeed, seems to afford the most substantial reason for a departure from the general rule; since, notwithstanding a witness may be abroad, a commission may, if necessary, (though the proceeding is inconvenient,) be sent out to examine him: *Fitzherbert v. Fitzherbert*, 4 Brown, 231; *Grayson v. Atkinson*, 2 Ves. Sen. 460: but, in such a case, an account may be decreed in the mean time, before the return of the commission, although there may not be proper evidence upon which the will can be declared formally and finally proved. *Fitzherbert v. Fitzherbert*, and *Wood v. Stane*, *ubi supra*; *Binfield v. Lambert*, 1 Dick. 337. Of course, if one of the witnesses become insane, he must be considered as if he were dead. *Bernett v. Taylor*, 9 Ves. 382. And it is well known, as a practice founded on the most obvious principles, that not only where one, but where *all* the subscribing witnesses are dead, still a written will may be proved, by proper evidence of the handwriting of the testator and of the witnesses. *Brice v. Smith*, Wills, 2; *Croft v. Paudet*, 2 Str. 1109. The opportunities of committing fraud would, however, be so great, if any laxity in the proof of nuncupative wills were admitted; that more strict caution is, properly, observed with regard to these, than in some respects is applied to wills regularly made. *Lemann v. Bonsall*, 1 Addams, 389. The Statute of Frauds is imperative, that a nuncupative will must be proved by the oath of three witnesses; not merely that three witnesses shall have been present: the death of one of the witnesses, (supposing no more than three to have been present,) before such proof has been formally made, will render the nuncupative will void; however clear and unquestionable the evidence of the two surviving witnesses to the transaction may be. *Phillips v. The Parish of St. Clement Dane*, 1 Equ. Ca. Ab. 404.

2. With respect to the case of *Darley v. Langworthy*, which was referred to in the principal case, Lord Eldon observed in *Soulhey v. Lord Somerville*, 13 Ves. 492, that he was disposed to agree with the opinion of Lord Camden, rather than the judgment of the House of Lords; and in the case last named, it was decided, that where a testator shows an anxious intention that two parts of his property shall go together, and his disposition cannot have effect as to one part, the devisee cannot take the part which the deviser intended him to take *only in conjunction with the other*; see, *ante*, the note to *Lowndes v. Stone*, 4 V. 649; and note 6 to *Brown v. Higgs*, 4 V. 708.

3. That a substitution by codicil must, *prima facie*, be understood to be attended with all the same incidents as the original bequest for which it was substituted; see note 2 to *Leacroft v. Maynard*, 1 V. 279.

STURDY v. LINGHAM.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1800, MAY 30.]

THE MASTER may proceed *de die in diem* without an order. Overruled. (See the note, (1) (a).)

MR. RICHARDS for the Plaintiff moved, that the Master should be ordered to proceed *de die in diem* in taxing a solicitor's bill of costs.

THE MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] made the order; but observed, that an order for that purpose is unnecessary; though it is erroneously supposed, there must be an order. Where the cause requires it, the Master may, and it is his duty to, proceed *de die in diem* without an order (1).

SEE note 2 to *For v. Mackreth*, 1 V. 69.

YEO v. FRERE.

[* 424]

BOWERBANK v. COLLASSEAU.

[1800, MAY 29, 31.]

PLAINTIFF may except to the report and at the same time set down the cause for farther directions. (b)

ONE of the Plaintiffs took an exception to the Master's report, and at the same time set down the cause for farther directions; and the cause came on upon the exception and for farther directions.

Mr. *Hollist*, for the Defendant, made an objection on the ground of irregularity; insisting, that the rule of practice is, that the party cannot except and also set down the cause for farther directions.

THE MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN], said, if that was the practice, he thought there was no objection to altering it; for it is not unreasonable for the Plaintiff to object to one *item* of the Master's report, and at the same time say, if the Court

(1) In *Purcell v. M'Namara*, *post*, xi. 362, it was settled, that an order is necessary.

(a) But under the orders of April, 1828, every Master is at liberty without order to proceed in all matters *de die in diem*, at his discretion. Order 58th, Ayckbourn, Ch. Pr. (Eng. ed. 1844,) 238, App. 73; 1 Barbour, Ch. Pr. 476, 477, b. 2, ch. 3.

(b) 2 Smith, Ch. Pr. (Am. ed.) ch. 37, p. 396, 397; 1 Barbour, Ch. Pr. b. 2, ch. 4, § 2, p. 559, 560. See Ayckbourn, Ch. Pr. (Lond. ed. 1844,) 206, 207; *Rookes v. Rookes*, 7 Jurist, 1104.

shall be of opinion, that the Master is right, he desires, that the cause may go on.

The objection was over-ruled ; and the cause proceeded.

AFTER an interlocutory decree, reserving farther directions, and referring certain points to the Master ; when the Master has made his report, either party may, by petition, obtain an order, as of course, to have the cause set down ; which order must be served on the clerk in Court of the adverse party : and if exceptions have been taken to the report, the cause may be brought on upon those exceptions, and for farther directions at the same time. But, in that case, a copy of the report, as well as of the previous interlocutory decree, should accompany the petition. *Harrison's Cha. Prac.* 488. Upon farther directions the Court may add to the decree. *Cruze v. Hunter*, 2 Ves. Jun. 164.

BENFIELD, *Ex parte*.

[1800, JUNE 14.]

A PARTNERSHIP cannot be established by the evidence of the partners and their private communications. The fact must be proved *aliunde*. For want of such proof a commission against the ostensible partners was sustained.

UPON the 25th of March, 1800, a joint commission of bankruptcy issued against Paul Benfield, Walter Boyd, and James Drummond, who entered into business at London, in partnership under the firm of Boyd, Benfield, and Co. in March 1793 for six years.

The petition was presented by Benfield ; praying, that the commission might be superseded, upon the ground, that the commission did not include all the partners of the house : the house at Paris of Boyd, Ker, and Co. being engaged in partnership with the house in London.

The affidavit of the petitioner stated, that he verily believes, William Ker, Walter Boyd, the younger, Edward De Walkiers, and Francois Dort Laborde, were concerned and interested in [*425] the said * firm of Boyd, Benfield and Co., as co-partners therein. In support of the petition letters received by the petitioner were read : one from De Walkiers, dated Paris, the 23d of March, 1793, contained the following passage :

"I have just received the circular letter, which announces your establishment with my friend Mr. Boyd and our house at Paris. I felt great pleasure in seeing this affair concluded between you ; and felicitate myself on having a connection of common interest with you."

A letter from Laborde, dated the 29th of March was thus expressed :

"I have been very happy to see at last after so long waiting the settling of the business, which makes us quite partners."

Extract from a letter from Mr. Boyd, dated Putney Hill, 4th Octo-

ber, 1796.—“The sum which B. K. and Co. owe for W^r. is a debt, that they are guarantees for; and considering the house to have gained a large sum I sat this debt in my own mind over against their capital share of the profits.”

Walter Boyd the elder by an affidavit, sworn in December 1799, stated, that the only acting partners in the house of Boyd, Ker, and Co., of Paris, which house was interested in the deponent's name in that of Boyd, Benfield, and Co., were the deponent, John William Ker, and Walter Boyd, junior; and that Edward De Walkiers and Francois Dort Laborde were the only *commandite* partners therein; and that the contract of partnership entered into among the above parties was to endure for six years from the 30th of June, 1791, and consequently expired on the 30th of June, 1797; though from the seizure of the property and books by the French and the removal of the acting partners from the French territory in 1793 and other circumstances, the affairs of the house remain unliquidated. In August 1797 the deponent purchased for account of the house of Boyd, Ker, and Co. Laborde's interest in that establishment.

The Lord CHANCELLOR, [LOUGHBOROUGH], when the petition was opened, expressed his opinion, that nothing could be done upon it.

Mr. *Richards* and Mr. *Fonblanque*, in support of the petition. This is a question to be tried at law: but it will be more properly *tried and with more effect under your Lordship's [*426] direction to the Commissioners to examine the parties for the purpose of discovering the partners. At law we could not have the benefit of Boyd's evidence. This commission may proceed at a great expense, as long as it is the interest of Boyd that it should proceed. But if ever his interest should be the other way, he who can alone produce the means of establishing the partnership of the house in Paris, may at any time by so doing supersede this commission. The object of the petition is only, that a valid commission may be taken out. In the bankruptcy of *Lane and Frazer* the commission was superseded on proving *Boylston* a partner with them (1).

Mr. *Mansfield*, for the Assignees, having observed, that upon this ground a cohmmission against a partnership, where there is a dormant partner, must always be bad, was stopped by the Court.

LORD CHANCELLOR [LOUGHBOROUGH]. There is nothing upon this evidence to impeach the commission either here or at law. If the fact were proved, that there was another partner, known to the world, the commission would be bad, no doubt: but they cannot prove that by their own secret communication with a dormant partner. Suppose, an action had been brought: if there was another partner, they must plead in abatement: otherwise the action goes on; and then they must prove the partnership. In *Boylston's Case*

(1) See *Langston v. Boylston*, *ante*, vol. ii. 101, and the note; *post*, xvii. 403, *Ex parte Hamper*; and see the note, 404.

they proved him a partner. They did not call on Lane and Frazer for that purpose.

THE 16th section of the consolidated Bankrupt Act, 6 Geo. IV. c. 16, enacts, that it shall no longer be necessary to include even an avowed partner in a joint commission against others of the same firm; see note 3 to *Langston v. Boylston*, 2 V. 101; and note 2 to *Ex parte Hamper*, 17 V. 403.

HARDY v. REEVES.

[ROLLS.—1800, JUNE 9, 16.—SEE ANTE, VOL. IV. 466.]

A DEFENDANT claiming as a mortgagee, and by his answer denying notice of the Plaintiff's title, which was neither alleged by the bill, nor proved, an inquiry for the purpose of affecting him with notice was refused, first upon a petition to vary the minutes, and again upon a rehearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted.

IN this cause (reported *ante*, Vol. IV. 466) a petition of re-hearing was presented by the Plaintiffs, upon the same ground as the petition, under which they had attempted to vary the minutes of the decree; praying an inquiry, what sums of money the Defendant [* 427] Fox had advanced upon the security of his mortgage; and at what times respectively; and whether on or before the 3d of April, 1789, the date of such mortgage, and when first, he had any and what notice of the title or claim of the Plaintiff Mary Hardy; or that the Master may state any special circumstances.

Mr. Piggott and Mr. Johnson, for the Plaintiffs; Mr. Lloyd and Mr. Hart, for Defendants in the same interest.

This Defendant puts his claim upon the ground, that at the time, when he advanced the sum of 680*l.* upon the security of a mortgage of these copyhold premises, he was totally ignorant of any right or claim on the part of the Plaintiff to the said copyhold premises; insisting, that as a purchaser for valuable consideration without notice his security ought not to be affected by the Plaintiff's claim. The object of the inquiry proposed is to ascertain that fact; whether he had notice, or not. Absence of notice of the equitable title is absolutely necessary for him. It will be objected, that the Plaintiffs did not give evidence of notice: but it would have been useless, and loading the cause to no purpose, till we got a decree upon the principal point: that point being established in favor of the Plaintiff, the other is consequential.

The evidence to be produced is, that Fox under a power of attorney from Reeves received the rents; and gave an indemnity against the claim of the Plaintiff: that claim, of which he swears he was totally ignorant. Are we to be put to file another bill upon

this ; which we clearly might do ? The only objection is, that this inquiry would be a surprise ; as the bill contains no allegation of notice : but this is not that sort of case, in which it is necessary to state the point upon the face of the bill in order to put it in issue. Every fact, to which the Plaintiffs intend to examine witnesses, ought to be put in issue by the bill, to prevent surprise : but this is a conclusion of law. The Defendant insisting upon it as part of his title, the Court ought to be satisfied, whether it is founded. If not now, some inquiry must take place in some future stage. The objection set up by the answer for want of notice, extending only to 680*l.*, does not cover the whole sum claimed ; which exceeds 1100*l.* He could only be protected in advances made previous to notice, not in subsequent advances ; and as to the excess beyond 680*l.* the answer is silent. This is a copyhold estate : and if the Defendant took the ordinary means of informing himself, he must have had notice. * He was bound to use due [* 428] diligence. The inquiry is of absolute necessity ; and no technical rule stands in the way. Inquiries in this way are in daily experience ; as upon contracts for the sale of an estate the Court inquires, not only, whether such contracts were executed, but whether they were fairly executed. In this cause a great many things must be inquired into, and stated hereafter. By this decree the Court did not mean to direct a mere inquiry as to the execution of the mortgages, but as to any valid mortgages, and *bona fide* advances ; so as to give priority. Suppose evidence were given only sufficient to raise a suspicion of notice : could the bill be dismissed ? The circumstances of this case are themselves sufficient to raise suspicion. A Court of Equity is not bound by any positive rule in cases of this nature. A direction, that the Master may state any special circumstances as to this mortgage will be sufficient.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. The difficulty with me is the nature of the notice : notice of what ? Of an equity. Suppose, this Defendant Fox knew, the Plaintiff had possession nineteen years ; and then an ejectment was brought ; which had gone to issue ; to try, which had the legal title ; and then this Plaintiff permits the Plaintiff in that ejectment, having recovered, to continue in possession nine years ; and now says, no man was to trust him with a farthing ; because after nine years they have found out an equitable title. Suppose, he said, he knew, Fryer had the legal estate ; and the Plaintiff was his residuary legatee ; that an ejectment was brought by his heir : and nothing was set up against that but a legal title ; and now the Plaintiff sets up this equity. Notice of an equitable title is quite different from notice of a legal title.

Mr. *Richards* and Mr. *Sutton*, for the Defendant Fox, in support of the decree. First, the Court cannot grant an inquiry for want of the allegation of notice in the bill : secondly, because upon the result of the inquiry, if favorable to the Plaintiff, a purchaser for valuable consideration cannot be affected. To impeach a title in equity a case must be stated upon the pleadings, and established by proof

originally in the cause. The only notice, that could affect this Defendant, is notice, that Reeves was a trustee for the Plaintiff. The only circumstance, is, that he found Reeves had recovered in ejectment. If these Plaintiffs had conceived, that they were [* 429] * entitled to this as personal estate, they should have stopped that action *in limine* ; or have filed a bill : but thinking it real estate in the testator beyond all question, they lie by during nine years ; in which period every act of ownership, borrowing money, repairing, &c. is exercised by Reeves. It is said, it would have been idle in the Plaintiffs to have proved notice against a purchaser, till the case was established against the copyhold heir. It was equally material to prove their case against the purchaser, as against the heir, under whom he claims. It made no difference to the purchaser, whether the heir was a party or not. In a case a few days ago, upon a voluntary conveyance by a man, not long before his death, who died greatly indebted, a bill was filed by creditors : but the Plaintiffs not having proved, that he was indebted at the time, your Honor would not direct an inquiry ; but dismissed the bill ; because the allegation was, that he was indebted at the time, as well as that the deed was voluntary (1). That inquiry was very properly refused ; for it was not to supply defective proof, but to supply the absence of all proof. An inquiry cannot be directed, unless the allegation, which is necessarily put in issue, is proved, at least so as to put the Court in considerable doubt. It is said, the denial in the answer gives a ground for the inquiry. It is contrary to every rule established, and every rule, that can be consistent with sense, that, because notice is denied, and they have no ground to contradict that denial, therefore it is to be presumed, the denial is false. It is incumbent on the Plaintiffs to produce authorities for such an inquiry ; for in daily experience we have never seen a case of this kind brought to a hearing without evidence of notice. To entitle himself to any decree he is obliged to give evidence. As the Court has already intimated, notice of this sort of Equity is very different from that sort of notice, which affects a purchaser for valuable consideration or a mortgagee ; which has no relation to that sort of Equity, that is to be collected from a variety of facts and circumstances ; and after all may be extremely doubtful.

The cases of *West v. Erissey* (2), *Warrick v. Warrick* (3), and *Cordwell v. Mackrill* (4), show the distinction in favor of a purchaser. Lord Camden's opinion is clear ; that notice of that sort of

Equity, that arises to the issue upon marriage articles, [* 430] where the * settlement by pursuing the very words has given the parent an estate tail (5), is not that sort of notice, that affects a purchaser for valuable consideration. This Plain-

(1) *Lush v. Wilkinson*, ante, 364.

(2) 2 P. Wms. 349.

(3) 2 Atk. 291.

(4) Amb. 515.

(5) See the references in Mr. Cox's note to *West v. Erissey*, 2 P. Wms. 349 ; and *Fearne's Cont. Rem.* 123, &c. ; where the subject is discussed at length.

tiff's case therefore would be no better, if it could be shown, that this mortgagee knew every thing, which from this argument is now known. In principle it is like the case of a prior mortgagee not taking the title-deeds; which gives priority to the subsequent mortgagee.

Mr. *Piggott*, in reply. Without this inquiry justice cannot be done. It is contended, that, whatever notice may be proved against the mortgagee, he cannot be affected. He took his mortgage three or four months after the recovery in ejectment. It cannot be stated as a case of absence of all notice whatsoever; and the Plaintiffs only desire to show the nature of the real transaction; leaving open every defence, that can be made. The answer is replied to: therefore the point of notice is put in issue. The Defendant drives the Court to say, no case of Equity can be made out against him. Is the justice of the Court to be shut out for want of a distinct allegation in the bill? Is the Court to drive the parties to the necessity of a new suit? The only consequence will be, that several years hence another bill will be filed for this purpose. This is desired in a Court, where parties are not bound to technical forms; if substantial justice can be done. The Court continually direct inquiries incidentally; sometimes upon the suggestion of Counsel; but in this instance the point is put in issue. The Defendant by his own allegation covers only 680*l*. Ought not the fact of notice to be ascertained as to the remainder of the money? At all events the inquiry can do no harm.

In the case in *Ambler*, it is plain, Lord Camden had considerable doubt upon the articles, whether the husband was intended to be tenant for life or tenant in tail. In a late case of Mr. Temple, a trustee, your Honor condemned him in a large sum of money; though nothing was put in issue in the cause: but it came out incidentally. I objected, that he had no opportunity of answering; but the inquiry was directed.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. The questions in this case are, in the first place, whether under the circumstances the Plaintiffs have entitled themselves to an inquiry; *secondly, if they are not strictly entitled to it, [*431] whether justice will be better administered by granting an inquiry.

First, as to the title to it: the Plaintiff's Counsel in the reply has very artfully not brought forward the reason, why there was no express charge of notice: for I remember, in the outset of the argument the reason was given; that it was doubtful, until the cause was heard, whether the Plaintiffs themselves had any equity whatsoever. If that is so, it is surely a little too much to say, there is a clear, broad, plain, Equity: of which a purchaser for valuable consideration was to take notice. That reason was dropped in the reply very wisely; for it is a clear answer in itself. Clearly this was not an Equity for a purchaser for valuable consideration to take notice of. Then they refused to go into evidence, according to the general rule

of the Court ; because they were afraid, they should not be able to establish their case at all. In 1797 for the first time the Plaintiffs claimed. Till then they never appear to have acted as representatives of the mortgagee, or to have claimed any title in that character. It is impossible, she should be admitted in that character. The steward could not have admitted her as such. The admission was to an estate in fee, subject to such equity of redemption, if any, as the heirs of the mortgagors had in the premises. Upon what footing could Mary Usher be admitted, except under the will ? She had no other title ; and under that she was for nineteen years in possession. At that time the heir found out, this was a mistake ; and he brings an ejectment. How ? As heir, against the person claiming as devisee. Did she set up this defence, as mortgagee ; of which, it is said, this Defendant Fox had notice ? She knew, she could not. She sets up a title as devisee ; and goes to trial ; and the verdict was in favor of the heir Mary Reeves. It is said, this mortgagee was supporting her all the time. It is true, he was supporting her, as heir, against the other, as devisee ; and he has succeeded.

I shall forbear now from entering into the merits of his defence ; as it may be brought forward again : but if it does come on again, this Defendant may say he was entrapped. The judgment in the ejectment was obtained by the heir at law against the devisee. [* 432] * The heir having succeeded, it does not appear, that any claim was set up in the character, in which the Plaintiffs have now succeeded ; which was necessary in order to affect a purchaser for valuable consideration. This Defendant when called on, says, he is a mortgagee without notice of the claim they make. Then they ought to have alleged, that he had notice ; by conversations, or otherwise. The Court would then have seen, what notice you intended to affect him by : and he has a right to have that proved, to a common intent at least, that he might be enabled to meet the charge : but you take him by replying to his answer. You have not apprised him of the notice, to which he may point his defence. You ought to put that in issue, to enable him to negative that evidence of notice proved, and to shelter himself, in the first instance, without being sent to the Master's office. Instead of that, without proving any thing of that notice you try your own claim of a redeemable interest ; in which certainly you have succeeded.

It is then said, it will be much better to go to an inquiry, if they consent ; instead of making a new suit necessary. I do not know, that it will not : but there is no case for that. The kind of notice is of a very doubtful nature. It is not a clear case ; like the case that has been put, of a mortgage, the title-deeds being left with the mortgagor, and a subsequent mortgage. All this notice proceeds upon fraud. I think that not by any means the sort of notice you have at present stated, as the sort, by which you mean to affect him. That will not induce me to go out of the common road.

Therefore, as the case now stands upon these pleadings, the Plain-

tiffs are not entitled to any inquiry, whether this Defendant had notice, or not. I will not say, how it may be hereafter; when all the circumstances are brought forward by them, and he can give his answer, before any inquiry is directed. One part of this decree must certainly be altered, by inserting an inquiry, what sums of money the Defendant really and *bona fide* advanced upon the security of that mortgage, and at what times respectively. That part of the prayer must be granted. As to the rest, I only wish to throw out, that the point, if brought forward hereafter, will be, whether at the respective times, when the Defendant advanced the money, he knew, they had a redeemable interest, and no real estate. If you can affect him with that, it will certainly do: not otherwise (1) (a).

SEE, *ante*, the notes to S. C. 4 V. 466.

[* 433]

DRUMMOND v. THE DUKE OF ST. ALBANS.

[1800, JUNE 16, 17.]

THE grant of the office of Register of the Court of Chancery for lives in trust for the Duke of St. Albans, his heirs and assigns, descends to the heirs general; and does not follow the title; and being assignable, the claim of the mortgagee was established, but not to the by-gone profits. (b) (See, *ante*, vol. iii. 25.) The Duke, being trustee, but having obtained possession without title, as heir, the Court, though the Plaintiff was an infant, inclined not to carry the account farther back than the time of filing the bill, if the profits had not been paid into Court at an earlier date in the suit instituted by the mortgagee. (c)

By letters patent, dated the 30th of May in the 11th year of the reign of the present King, the office of Register of the High Court of Chancery was granted, to have, enjoy, occupy, and exercise, the aforesaid office, unto George, Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerk, by themselves or their sufficient deputy or deputies, to be first approved by the Chancellor, or Keeper, or Commissioners for the custody of the Great Seal for the time being, for and during the term of the natural lives of the said George, Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerk, and the life of the survivor; in trust nevertheless for the aforesaid George, Duke of St. Albans, his heirs and assigns; together

(1) *Hansard v. Hardy*, *post*, vol. xviii. 455.

(a) In reference to the doctrine of notice of prior claims, see 1 Story, Eq. Jur. § 395, *et seq.*; *Flagg v. Mann*, 2 Sumner, 491; *Jones v. Smith*, 1 Hare, 43; *Thayer v. Cramer*, 1 McCord, Ch. 395; *Sigourney v. Munn*, 7 Conn. 324; *Booth v. Barnum*, 9 ib. 286; *Pitney v. Leonard*, 1 Paige, 461; *Curtis v. Mundy*, 3 Metcalf, 405.

(b) See note (a), to *ante*, 3 V. 25, and cases there cited; 4 Kent, (5th ed.) 164; *Wilder v. Houghton*, 1 Pick. 90; *Boston Bank v. Reed*, 8 Pick. 459; *Pope v. Biggs*, 9 Barn. & Cress. 245; *Cavis v. M'Clary*, 5 N. Hamp. 530; *Filchburg Col. Manu. Co. v. Melven*, 15 Mass. 268.

(c) See *Hercy v. Dinwoody*, 4 Bro. C. C. (Am. ed. 1844,) 258, 269, note.

with all manner of wages, fees, profits, rents and advantages, emoluments, commodities, and liberties, whatsoever, to the aforesaid office belonging; and all such the like and the same wages, &c., as Charles, Duke of St. Albans, George, Viscount Malpas, and Lord James Beauclerk, had ever had, received, enjoyed, &c.

George, Duke of St. Albans, died in 1786; leaving George Beauclerk, his heir at law; being only son and heir of Charles Beauclerk, the son and heir of William Beauclerk, eldest uncle of the first Duke George; who died without leaving any issue, brother or sister.

The first George, Duke of St. Albans, by his will, dated the 13th of September, 1785, desired, that all his debts and funeral expenses, might be first paid; and, after giving some annuities and legacies, and charging them upon his Leicestershire estate, and all other his estate and effects, he devised the said freehold estate in Leicestershire to trustees, their heirs and assigns, in trust for securing the annuities; and he gave all the surplus rents, and the increased rent upon the deaths of the annuitants, to his daughter Fromont and her husband during their joint lives and the life of the survivor; and after their decease he gave all such surplus rent, &c., to his nephew George Beauclerk, his heirs and assigns; and after the deaths of the annuitants and the trusts performed he devised the said Leicestershire estate to his said nephew, his heirs and assigns for ever; and he appointed his trustees his executors.

[* 434] * George, the second Duke of that name, died in 1787; leaving Charlotte Drummond, widow, his aunt on the part of his father, his heir at law. By his will, dated the 29th of January, 1787, after disposing of certain estates in the county of Surrey, he devised all his manors, messuages, lands, tenements, fee farm rents, and other rents and hereditaments, in Middlesex, Cheshire, Lancashire, and York, and all other his real estates whatsoever and wheresoever, not otherwise disposed of, and all his estate, right, title, equity of redemption, use, trust, property, claim and remainder, of, in, to, or out of, the same or any part thereof, to Alexander Hope and George Wheatley, their heirs and assigns, to the use of Henry Beauclerk and Daniel M'Namara, their executors, &c., for 1000 years, without impeachment of waste; and after the determination of that term, and subject thereto, to the use of his aunt Charlotte Drummond for life without impeachment of waste, and with power of leasing; and after her decease to the use of his cousin George Drummond, his heirs and assigns for ever.

The testator then declared the trust of the term, for raising so much money as his personal estate should be deficient to pay his debts, exclusive of 8000*l.*, and his funeral and testamentary charges and legacies. Then, after giving some legacies, he gave all his goods, chattels, &c., and all other his personal estate whatsoever and wheresoever, and of what nature, kind, or quality, soever, after and subject to the payment of his debts, &c., to his cousin George Drummond, his executors, &c.; and he appointed Henry Beauclerk and George Drummond executors.

George Drummond, the eldest son and heir at law of Charlotte Drummond, made a general devise of all his freehold manors, messuages, &c., and also all other his real estates whatsoever and wheresoever, not being copyhold, subject to a trust to sell in aid of his personal estate, for the payment of his debts, &c., and for other purposes, in trust for his eldest son, his heirs and assigns, upon attaining the age of twenty-one; with limitations over in case of his death under that age without issue living at the time of his death. The testator also bequeathed the residue of his personal estate in trust for his said son at the age of twenty-one; and, in case of his death under that age, over.

George Drummond died in 1789. Charlotte, his mother, died in 1793; having by an unattested will made a general disposition of *her real and personal estates, subject to her [* 435] debts and legacies, in favor of her second son John Drummond, his heirs, executors, &c.

Aubrey, Duke of St. Albans, had obtained possession of the office upon the death of the second Duke George; and by his answer to the bill of the mortgagees (1), put in with the demurrer, he stated, that he possessed the office as heir at law. In 1795 the Deputy Registers received notice not to pay any more of the profits to the Duke; and in 1798 a receiver was appointed.

The bill was filed in 1797 on behalf of the infant grandson, devisee and heir at law of George Drummond, also heir at law of Charlotte Drummond and of the two Dukes George, against Aubrey, Duke of St. Albans, Colman and Martin, the personal representatives of Bridget Crewys the mortgagee (2), the trustees and other parties interested under the will of the second Duke George, and the personal representative of Charlotte Drummond; praying, that the Defendant, the Duke of St. Albans, may account for all sums of money, which since the death of the second Duke George and before and since the death of Charlotte Drummond down to the present time, have been received by him, &c.; and that he may be declared a trustee of the office and of the profits and emoluments thereof for the persons entitled under the letters patent; that the interests of the several Defendants may be ascertained; and that so much as the Plaintiffs shall appear interested in may be secured.

The Defendants, the representatives of the mortgagee, by their answer stated, that upon the death of Charles Beauclerk, one of the lives in the last patent, George, Duke of St. Albans, neglected to procure a new grant; and consequently committed a breach of covenant: and they submitted, whether the will of the first Duke George affected his interest in the office; or, whether the second Duke George did or did not become entitled as heir at law or otherwise. They stated, that the Defendant, the Duke of St. Albans, upon the death of the second Duke George took possession of the

(1) *Colman v. The Duke of St. Albans*, ante, vol. iii. 25.

(2) See *Colman v. The Duke of St. Albans*, ante, vol. iii. 25.

office; and they suggested, that he was only a trustee. They insisted upon the mortgage; that the emoluments received [* 436] by the Defendant, the Duke of St. Albans, and by * the first Duke George, are to be considered assets of the said Duke, and subject to the mortgage; and that the Duke upon the faith of his covenant by the indentures of 1771 (1), to procure a new grant upon the death of any of the lives for the two remaining lives and the life of some other person, and to make a new security upon such new patent, received all the fees, paying only the interest of the mortgage; and what he has so received is more than sufficient to pay the whole mortgage, &c.

Mr. Mansfield, Mr. Piggott, and Mr. Steele, for the Plaintiff: Mr. Lloyd, and Mr. Campbell, for the personal Representative of Mrs. Drummond. It is indifferent to the Plaintiff, whether this property is considered devisable or not: but it is impossible, that the testator could have any idea of this, when he was making limitations of his real estate generally; subjecting it to a term of 1000 years; this property being granted only for three lives. But the Plaintiff is entitled either under the will of the Duke or as heir of his grandmother; who was heir of the Duke.

With respect to the claim of the Defendants under the mortgage, your Lordship allowed the demurrer to their bill for an account of the past profits (2). There is therefore no right as to them. The question now is, whether their mortgage is such as can be maintained. Great doubts have been entertained, whether the profits of an office can be made the subject of a security. It was decided long ago, that the office of Prothonotary of a Court of Justice cannot be assigned; as it would go to executors and administrators (3). Sir Joseph Jekyl's language in *Bellamy v. Burrow* (4) applies very much to this case; showing, that the Crown may certainly create a trust of this kind; but without the intervention and privity of the Crown there can be no assignment or trust of such property. It does not follow, that an office may be made the subject of a mortgage, because the interest in it is given to a man and his heirs. . The responsibility of the person appointed to the Court would in a great measure cease. The question has very lately occurred [* 437] * upon the assignment of an officer's half-pay; and the decision was, that such an assignment is not legal (5).

The claim of the Duke of St. Albans is quite out of the question. Certainly the object of this grant was not to support the title. The Duke of St. Albans is therefore a trustee.

The Solicitor General [Sir William Grant] and Mr. Fonblanque,

(1) *Ante*, vol. iii. 32.

(2) *Colman v. The Duke of St. Albans*, *ante*, vol. iii. 25.

(3) The case was not mentioned: but the reason here stated is to be found in *Mende v. Lenthall*, Cro. Car. 587; and in 9 Coke, 97, in *Sir George Reynel's Case*. The subject of those cases was the office of Marshal of the Court of King's Bench.

(4) For. 97.

(5) *Stone v. Lidderdale*, 2 Anstr. 533; 4 Term Rep. B. R. 248.

for the Defendant the Duke of St. Albans, observing that the original intention certainly was, that this office should go with the title, but that, as the patent is expressed, it would be difficult to contend, that it is confined to such heirs as should be Dukes of St. Albans, gave up the point.

With respect to the personal representatives of Mrs. Drummond they said, it was unnecessary to decide that question: when it should arise, the answer would be, that the Court cannot do for her what she did not do for herself in her life.

The *Attorney General*, [Sir John Mitford], Mr. *Richards*, and Mr. *Short*, for the Defendants, the executors of the mortgagee. The representatives of the mortgagee are entitled to arrest the profits in their passage from the Defendant, the Duke of St. Albans, to the Plaintiff. The title of the Plaintiff and of the mortgagee is one and the same. How can the heir claim in preference to the assign? The heir cannot possibly claim against the grant of his ancestor. Sir Joseph Jekyl's reasoning in *Bellamy v. Burrow* is decisive. The want of privity in the Crown was the ground, upon which Lord Talbot conceived he ought not to hold the Defendant a trustee. That is not the case here. The Crown was privy to the trust; and meant, that it should be enjoyed as a trust: the profits going to another person, not holding the office. The Plaintiff claims simply in that right. The Crown meant, that the office should be held in trust; and if in point of law it could not be so held, the grant would be void; the Crown being deceived in the grant. The assignment is made carefully of the profits of the office, not of the office itself. This property has for a very long period been conceived capable of this disposition. If this is to be considered as assets, upon the ground, that the covenant was broken, it is liable in that respect. But *there can be no doubt, this is [*438] a trust capable of being assigned as well as declared.

There is no control in the assignee over the appointment of the officers; for it is a mere assignment of the profits; and probably is so framed on purpose. In *Seymour v. Bennet* (1) Lord Hardwicke taking into consideration a trust of the same description upon the grant of an office conceived, the *Cestuis que trust* would have, not only the pecuniary profits, but also according to the terms of the grant the nomination of the deputy. The question is, how the profits, that have been paid in under the appointment of the receiver, are to be disposed of by the Court: if to the Plaintiff, it must be by force of the trust declared by the letters patent, perfectly with the privity of the Crown. The prayer of the bill is equally adapted to the assigns as to the persons claiming as heir. The Plaintiff comes in the nature of a person seeking to redeem, and cannot take the property without discharging the mortgage. This cannot be said to be a case of fraud. It has no resemblance to the case of half pay; which is attached to the office itself: but in this

instance the Crown has separated the profits from the office. This is not within any of the mischiefs, that have been represented. In *The King v. Metcalf* (1), upon the office of Marshal of the Court of King's Bench, the same objection was taken. It was much discussed; but does not appear to have been decided.

LORD CHANCELLOR [LOUGHBOROUGH]. I do not feel any argument from all the cases referred to, and I have looked into them, that would not go to declare this grant void. If it can be sustained, that it is not assignable, then it is not descendible. Every argument goes equally to the descent to an infant, incapable of executing the duties of the office. How far do you carry back the account against the Duke?

For the Plaintiff. The Plaintiff is entitled to the profits from 1787 down to the present time. As to the right of the mortgagee, the profits received before the bill was filed, are by-gone profits; and the ground taken by your Lordship upon the demurrer applies.

LORD CHANCELLOR. The mortgagee cannot call upon the Duke for the by-gone profits (2). But with regard to the account [*439] prayed against him by the Plaintiff, the Duke did not enter as a trustee, but upon the ground, that the right was in him. Therefore should I carry it back against him farther than the usual time, within which the Court gives an account? I agree, he is a trustee: but he had no notice of the trust, till the bill was filed. It is that species of hardship the Court relieves against: where a man enters into possession of an estate under a wrongful idea of title, and is permitted to continue in possession, and it is to be got from him in this Court, this Court will give the account no farther back than it is given in damages at law in an action for mesne profits (3).

For the Plaintiff. The Duke was the legal hand to receive the profits. Where there is an express trust, the account must extend to the whole, notwithstanding the mistake. Who is to suffer by the mistake? Is an express trustee not to account for profits received, though by mistake? The Plaintiff also was an infant during the whole time; and then even in the cases alluded to by your Lordship the account is not confined.

For the Defendant the Duke of St. Albans. The Duke proceeded upon the notion, that the Duke of St. Albans for the time being was the person entitled. What equity then is there for any of the parties to claim an account from any earlier period than that, at which they thought fit to set up their title?

(1) James II.

(2) *Mead v. Lord Orrery*, 3 Atk. 235.

(3) As to the limitation of accounts, see *post*, *Acherley v. Roe*, *Bramley v. Holland*, *Reade v. Reade*, *Chambers v. Goldwin*, 565, 610, 744, 824; vol. ix. 254; vi. 93; *Harmood v. Oglander*, 199, and the note, 215; viii. 106; *Pettineard v. Prescott*, vii. 541; *Stackhouse v. Barnston*, x. 453; *Williams v. Cousmaker*, xii. 136; *Pickett v. Loggon*, xiv. 215; *Dormer v. Fortescue*, 3 Atk. 124, 9, 130; *Gresley v. Adlerley*, 1 Swanst. 573; 1 Ball & Beat. 120; *Bowes v. East London Waterworks Co.* 3 Madd. 375. No analogy in cases of trust to the Statute of limitations: *Attorney General v. The Brewers' Co.* 1 Mer. 495; 4 Pri. 86.

LORD CHANCELLOR [LOUGHBOROUGH]. I understand, the Duke was let into possession upon the death of the second Duke George ; who was heir at law : the possession then being in the *cestui que trust* ; and being distinctly given up to him, not *qua* trustee, but by a common mistake of all, that he was entitled to the profits of the office.

This is a bill for the execution of a trust. Different persons are interested in it. The first person, to whom the trust belongs, is the mortgagee, I can make no decree for the personal representative of Mrs. Drummond. With respect to the account against the Duke, the time I should have taken would have been the filing of the bill : but in fact the profits were stopped before ; and therefore it is money in Court.

Declare a trust of the office for the Plaintiff, subject to the mortgage, now vested in the Defendants Colman and Martin ; * and that the money paid into Court, and the stock in [*440] which it has been invested, are subject in the first place to answer what is due to the mortgagee for principal and interest, and costs in this and the other cause. Direct an account for that purpose. Let the Receiver be discharged ; and direct the future profits to be paid by the Deputy Registers to the mortgagee, subject to farther order.

The LORD CHANCELLOR observed, that there was an Act of Parliament, in which the mortgage was stated ; and this office, the other office of Great Falconer, and the pension, were all made subject to debts, &c. Two acts had been obtained by the first Duke George, in 1767 and 1776, vesting this and other offices, with other property, in trustees, upon trust to be sold for payment of debts.

See, *ante*, the notes to S. C. 3 Ves. 25.

RAWLINS v. GOLDFRAP.

[ROLLS.—1800, JUNE 19.]

RESIDUE of personal estate bequeathed to the children of the testator's two daughters, their executors, &c.; with a limitation over in case both his daughters should die without issue; a vested interest in the grand-children; and the limitation over is too remote. (a)

A direction by will to apply so much interest as might be necessary towards the maintenance and education of the testator's grand-children upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother: their father having by his will left them a considerable property, with a provision for maintenance, (b) [p. 440.]

A father may leave his children under a maintenance; and the parish have no remedy against the executor, [p. 440.]

WILLIAM WHARTON devised all his estates in the island of St. Christopher, with the stock, &c. thereto belonging, and gave all the rest of his personal estate, to trustees, their heirs, executors, administrators, and assigns; upon trust, after payment of his debts, legacies and funeral expenses, out of his personal estate, and subject to certain charges, to apply the residue of the yearly produce of his real and personal estates and pay the same equally between his two sons-in-law Stedman Rawlins and John Goldfrap during their lives and the lives of his daughters Elizabeth Taylor Rawlins, wife of Stedman Rawlins, and Sarah, the wife of John George Goldfrap;

(a) There cannot be an estate tail in a chattel interest, unless in very special cases. It is a settled rule, that the same words, which under the English law would create an estate tail as to freeholds, give the absolute interest as to chattels. 2 Kent, (5th ed.) 353, 354; 4 ib. 283; *Attorney General v. Bayley*, 2 Bro. C. C. (Am. ed. 1844,) 553; *Knight v. Ellis*, 2 ib. 570; *Foley v. Burnell*, 1 ib. 285; *Attorney General v. Hird*, 1 ib. 173, and notes; *Chatham v. Tothill*, 6 Bro. P. C. 450; *Britton v. Twining*, 3 Meriv. 176; *Paterson v. Ellis*, 11 Wend. 259; *Tothill v. Pitt*, 1 Madd. 488; *Jackson v. Bull*, 10 Johns. 19; *Henry v. Felder*, 2 McCord, 323; *Mathews v. Daniel*, 2 Hayw. 346; *Moody v. Walker*, 3 Arkansas, 147; *Phillips v. Eastwood*, Lloyd & Gould, Temp. Sugd. 270; *Lepine v. Ferard*, 2 Russ. & My. 378; 2 Story, Eq. Jur. § 990.

See 2 Story, Eq. Jur. § 988, where it is said, that in regard to terms for years and personal chattels, it may be observed, that they are capable of being limited in Equity in strict settlement, in the same way and to the same extent, as real estates of inheritance may be; so as to be transmissible, like heir-looms. See also *Fordyce v. Ford*, ante, 2 V. 536, note (a); Chitty, Genl. Prac. 101, cap. 3, § 1.

Courts seem very much inclined to support limitations even of personal estate. Fearne, on Executory Devises, by Powell, 186, 239, 259; *Dashiell v. Dashiell*, 2 Harr. & Gill, 127; *Eichelberger v. Bernetz*, 17 Serg. & Rawle, 293; see *Moffat v. Strong*, 10 Johns. 12; *Newton v. Griffith*, 1 Harr. & Gill, 111; *Royall v. Eppes*, 2 Munf. 479; *Hannan v. Osborne*, 4 Paige, 336; *Cudworth v. Hall*, 3 Desaus. 258; *Clifton v. Haig*, 4 Desaus. 330.

For a farther consideration of this subject, see 1 Williams, Executors, (2d Am. ed.) 507, et seq.; 2 Story, Eq. Jur. § 988, 989, 990; *Vaughan v. Burslem*, 3 Bro. C. C. 101; *Rice v. Satterwhite*, 1 Dev. & Bat. Eq. 69; *Mazyck v. Vanderhorst*, 1 Bai. Eq. 48.

A limitation over of personal property, after a dying under age, and without issue, was held good, the contingency not being too remote. *Jones v. Sothoron*, 10 Gill & Johns. 187.

(b) 1 Macpherson on Infants, (Lond. ed. 1841,) p. 256.

and in case of the death of either Stedman Rawlins or John George Goldfrap before their respective wives then to pay the same equally unto and between such one of his said daughters, who should so survive her husband and such surviving or other son-in-law; and in case of the death of both his said sons-in-law in the life of their respective wives then to pay the same equally unto and between his said two daughters during their lives: but in case either of his said *two daughters should die before her husband, [*441] then in trust to raise and pay within twelve months after her death 5000*l.* currency to such of his sons, who should so survive his said wife; and in case of the death of both his said daughters before their respective husbands he directed, that 10,000*l.* sterling, or such other sum as together with the said 5000*l.* currency should amount to 10,000*l.* sterling, should be raised out of his estates, and paid equally unto and between his said sons-in-law in satisfaction of all demands upon his estates real or personal; and in case either of his said daughters should die leaving issue, then in trust, subject to the payment of the said sums of 5000*l.* or 10,000*l.* upon the contingencies, aforesaid, to pay and apply so much of the share or proportion of such daughter so dying as might be necessary towards the maintenance and education of such child or children as she might leave, and the residue thereof from time to time to place out at interest as an accumulating fund for the benefit of such person or persons as should be entitled thereto under his will; and after the decease of both his daughters he gave, devised and bequeathed, all the rest, residue and remainder, of his estate real and personal unto and among all and every the children of his daughters, or either of them, in case there should be no children or child of the other, to be equally divided between them share and share alike, as tenants in common and not as joint-tenants, and to take *per capita* and not *per stirpes*, and their heirs, executors, administrators and assigns, for ever: and in case both his said daughters should die without issue, then upon other trusts.

The testator died in 1784. Upon a bill filed by Stedman Rawlins and his wife and their eldest son the will was established. Stedman Rawlins died in 1793. Elizabeth Taylor Rawlins died in 1797.

The bill prayed, that the Plaintiffs, the children of Rawlins and his wife, may be declared entitled under the will to have the interest of 21,244*l.* 11*s.* 8 1-2*d.*, a moiety of the residue of the testator's estate, or a sufficient part thereof, applied towards their maintenance and education from the decease of Elizabeth Taylor Rawlins and for the time to come during their respective minorities, &c. This was resisted on the ground, that the father of the Plaintiffs had given them a considerable property by his will, and had *made an express provision for their maintenance; and [*442] therefore, it was not necessary to apply the fund given by Wharton's will; the interest of the property given by the will of Rawlins being more than sufficient.

Mr. Hart and Mr. Cox, for the Plaintiffs. The Plaintiffs are entitled to this provision for their maintenance without regard to their having a provision *aliunde*. The argument must be, that their father meant by his will to relieve the fund given by Wharton; and subjected his own funds exclusively to the maintenance; giving the benefit to the Goldfraps. In *Andrews v. Partington* (1), which was an express gift for maintenance; the argument was, that the testator meant to give a benefit to the infant; and if that is applied in ease of the natural obligation of the father, the benefit is to the father by relieving him from the burthen. That argument is strong in favor of the plaintiffs, entitled to this provision under the will of their grandfather Wharton. This would have the effect of giving the benefit to other persons than those intended.

Mr. Piggott and Mr. Steven, for the Defendants. The bill is founded upon a misconstruction of the will. It is a question of intention undoubtedly; regard being had to the affluence of the father. A provision for maintenance in general must be taken to mean, if the children want maintenance. Can it be supposed, a testator could mean to relieve the most affluent parent from the common obligation? Suppose, the testator's daughter had died before her husband, who was in affluent circumstances: was it to dispense with the natural obligation of the father to maintain his children? It must be supposed, the testator had some idea of his own property. The interest of each moiety is but 900*l.* a year; and there are four children, two sons, and two daughters, entitled to very large fortunes. The whole of this moiety of the interest would be necessary. They must maintain, that this was an absolute gift of maintenance, without regard to the circumstances. The father of the other class of children, the Defendants, is living; and *non constat*, what will be their situation. The fair construction is, that, if these children are left destitute of a sufficient fund for their maintenance, [*443] this fund is to be applied. The word "necessary" has relation to the circumstances of the children, not to the *quantum* of the property; and what shall not be necessary is to accumulate. The expression is "towards" not "for" the maintenance and education. Upon the Plaintiffs' construction what could be the motive for postponing this provision for maintenance to the death of the mother? Upon their construction the charge is to increase in proportion to their ability to do without it; and the greater fortune they are entitled to the less will go to their cousins.

Reply. A will scarcely ever occurs, with a clause for providing maintenance, which is not qualified by such words as these, "so much as may be necessary." Whatever they are entitled to under Wharton's will they must remain entitled to notwithstanding their father's will. It is exactly the same as if the provision made by their father had been made by any other person; for certainly their

(1) 3 Bro. C. C. 60; see *Mundy v. Earl Howe*, 4 Bro. C. C. 223; *Hoste v. Pratt*, ante, vol. iii. 730, and the note, 733.

father was not bound to provide for them after his death ; whether that is wise, or not ; and though the Court will give interest upon a legacy for a child (1) if nothing is said about it in the will, that cannot be done, if the father chooses to say, he will not give the interest. The will is therefore to be construed as at Wharton's death, without adverting to any thing, that happened afterwards. If the father has directed a very expensive mode of education, any extra expense on that account must be borne by his estate.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This case arises upon the will of a grandfather ; who in this Court is not supposed under an obligation to provide for his grand-children after the death of his daughter. I cannot say, I quite agree to that doctrine : but I will not set up my own opinion upon it. The capital is by this will given so, that there is no vested interest in any particular share at least till the death of both the testator's daughters. In directing the application of the interest of the share upon the decease of the daughter, to whom he had before given it for life, he says, not that the interest till the capital is paid, but that so much, as may be necessary towards the maintenance and education of such child or children as she may leave, shall be applied. It is said, that shall be a competent, reasonable part, not the whole ; for he contemplated a case, in which they might not want the whole. It cannot be intended, as things stood at the time of his death, but at the death * of his daughter, with a view to the circumstances, in which the children should then stand. [*444] It is impossible, it could be at his own death ; for the maintenance was not to arise then. It is then said, I must allow the whole : I cannot say, it is not necessary for their maintenance and education ; and their father having left them a large fortune, I have nothing to go by ; and must allow the whole. The difficulty stated on the part of the Defendants is not answered : it would injure them ; and less accumulation would come to them, than if their cousins should not be entitled to so large a fortune as had been given to them. I am of opinion, that all, that is given to these children is after the death of their mothers the capital, whatever it may be, with all the accumulation of interest : reserving only so much as they have a right to demand for maintenance and education according to their situations : as much only as may be necessary, after all the appropriations for their benefit are exhausted, let it come from what quarter it may. They have no vested interest at all in the interest : nothing but what is wanted for their maintenance and education. I have no difficulty in saying, there is a vested interest in the capital. The limitation over is in the event of both his daughters dying without issue, not without issue living at the time of the death (2). One of the daughters is dead ; and has left issue.

(1) See *ante*, *Crickett v. Dolby*, *Mitchell v. Bower*, vol. iii. 10, 283 ; *Tyrrell v. Tyrrell*, iv. 1 ; *Chambers v. Goldwin*, *post*, xi. 1.

(2) See the cases collected in Mr. Cox's note to *Atkinson v. Hutchinson*, 3 P. Wms. 262, and Mr. Sanders's notes to *Lord George Beauclerk v. Dormer*, 2 Atk.

If the father had thought fit, he might, I am afraid, by the law of this country leave his children upon the parish. I am surprised, that should be the law of any country; but I am afraid, it is the law of this: and I have taken occasion before to say so. Not even the parish in such a case can come against the executor.

Declare, that the Plaintiffs are entitled to so much of the interest of the share of their late mother as may be necessary for their maintenance and education; and refer it to the Master to inquire, what fortune they are entitled to; with liberty to apply for what may be necessary for maintenance and education; and declare, that what shall not be necessary ought to be added to the principal; which with the share of the other sister Sarah Goldfrap will upon her death be divisible among all the children.

1. THAT a limitation over of personalty, in case a previous legatee shall die "without issue," is too remote; unless it can be clearly collected, that the testator intended to use those words in a more confined sense than their legal signification imports; see, *ante*, the notes to *Everest v. Gell*, 1 V. 286; and with respect to the allowance of interest, for the maintenance of infant legatees; see the notes to *Crickett v. Dolby*, 3 V. 10; and note 2 to *Greenwell v. Greenwell*, 5 V. 194.

2. Where there are two funds given absolutely by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied. *Foljambe v. Willoughby*, 2 Sim. & Stu. 169.

[* 445]

LONG v. LONG.

[1800, JUNE 20.]

COVENANT to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times, as he should appoint. The power was held well executed by a will directing a sale and appointing the money. (a)

Whether the infant issue of tenant in tail was bound by the election of his parent, *Quare*, [p. 445.]

An appointment by a father not illusory, where he gives other provisions to the object excluded, [p. 445.]

By indentures, dated the 12th of April, 1727, previous to the marriage of Walter Long and Philippa Blackall, the sum of 1000*l*. provided by the former, and the like sum provided by the latter, were directed to be laid out in stock, upon trust for Walter Long

308; Fearn's Exec. Dev. 4th and 5th ed. by Mr. Powell, 116 to 299; *Jacobs v. Amyatt*, 4 Bro. C. C. 542; *Everest v. Gell*, and *Chandless v. Price*, *ante*, vol. i. 286; iii. 99, and the notes.

(a) See 4 Kent, (5th ed.) 344, 345. A power to mortgage includes in it a power to authorize the mortgagee to sell in default of payment. *Wilson v. Troup*, 7 Johns. Ch. 32; *S. C.* 2 Cowen, 95.

In construing powers, the Court looks to the end and design of the parties, and the substantial rather than the literal execution of them. *Ib.*; see also *Osgood v. Franklin*, 2 Johns. Ch. 1; *S. C.* 14 Johns. 527; *Frouty v. Frouty*, 1 Bai. Eq. 517; see also *post*, 448, note (b).

for life; and after his decease for Philippa Blackall for life in bar of dower; and after the decease of the survivor to transfer the same to and among such child or children of the marriage, and in such shares and proportions, if more than one, as Walter Long should by deed or will direct or appoint; and, in default of appointment, unto and among all the children equally.

The indentures contained a covenant by Walter Long within fourteen years to purchase and settle and convey to the trustees a freehold estate of at least the value of the stock to the use of himself for life; remainder to trustees to preserve contingent remainders; remainder to the use of Philippa Blackall for life for her jointure and in bar of dower; remainder to the first and other sons in tail male; remainder to the daughters as tenants in common; remainder to the right heirs of Walter Long. It was farther declared, that in the said settlement should be contained a proviso or agreement, that, in case Walter Long should happen to have issue by the said Philippa any younger child or children, besides an eldest and only son, be they sons or daughters, it should be lawful to and for the said Walter Long in his life-time to charge the premises to be conveyed, as aforesaid, with the payment of such sum or sums of money for the benefit of such younger child or children, whether sons or daughters, payable in such proportions and at such time or times, as Walter Long should by any deeds or writings, to be by him duly executed in the presence of three or more credible witnesses, or by his last will and testament, direct, limit, or appoint; and after the purchase the stock, in which the 2000*l.* was vested, and the residue of her fortune, and the like sum of his agreed to be added thereto, were to be paid to him for his use; and as to the residue of her fortune over and above the said 1000*l.* it was to be paid to the trustees with the like sum of his to be laid out in stock upon the same uses and trusts as the said 2000*l.*

*The marriage having taken place, by indentures of [*446] lease and release, dated the 2d and 3d of July, 1729, reciting the settlement, the said sum of 2000*l.*, which had not been laid out in stock, and 500*l.* added by Walter Long, were laid out in the purchase of an estate, called Coombe Farm, as directed by the articles with regard to the proposed purchase, with a similar proviso, that it should be lawful for Walter Long to charge the said premises with payment of such sum or sums of money for younger children, as he should appoint.

Walter Long, being so seised of the Coombe Farm and other estates in fee, by his will, dated the 13th of July, 1767, devised to his son John Long his estate adjoining to Prewshaw Farm, to him and his heirs for ever. He also gave his son John the household goods of all sorts and all the liquors, which should be in or about his house at Prewshaw Farm at the time of his death. He declared his will, that Coombe Farm should be sold after his wife's death, agreeable to his marriage articles, and the money arising from the same be disposed of in manner following: 1st, to be paid to his daughter

Mrs. Routledge 500*l.*, as settled by her marriage articles; and he gave to his daughters, Mrs. Grove and Mrs. Routledge and his daughter Ann Long one guinea each; also he gave and bequeathed to his son John Long 100*l.*, when Coombe Farm should be sold; and he directed, that the remainder of such moneys, which that estate should sell for, should be equally divided between his two sons Samuel and William and his daughter Eleanor; and he appointed Walter Long, his eldest son by a former marriage and heir at law, his executor.

The testator died some time after the execution of his will. John Long, the eldest son of the marriage with Philippa Blackall, took possession of the estate at Prewshaw Farm and the articles devised and bequeathed to him by the will of his father; and died in 1797 intestate; leaving Walter Long his eldest son and heir at law. Philippa Long died in 1798. Upon her death the bill was filed by William and Samuel Long, Elizabeth Routledge, and Eleanor Long, the surviving younger children, against Walter Long the younger, and infant; praying a sale of the Coombe Farm, &c., according to the will of their father.

[*447] *Two points were made: 1st, whether the testator had any power to direct a sale; and, if he had, whether the appointment was good. Secondly: whether John Long by taking possession of the estate at Prewshaw Farm and the effects given to him by the will of his father had not elected to take under that will; and whether the Defendant was not bound by that election.

Mr. *Mansfield* and Mr. *Romilly*, for the Plaintiffs, were stopped by the Lord Chancellor; who observed, that the second point might admit a good deal of argument (1); but asked, what could be said upon the first.

Mr. *Richards* and Mr. *Bell*, for the Defendant. This case is new in its circumstances. The power is not pursued either in form or substance. The intention in these cases is, that the son shall have an election to redeem the estate by paying the money. The eldest son must be intended to have something. The objection upon illusory appointments also applies in this case (2).

With respect to the second point, election proceeds upon this principle: it is an offer by way of bargain on the part of the testator; upon which the Court says, if they do not accept the offer, they shall not have the estate under the will. Then it is like any other bargain with tenant in tail: but the issue in tail is not bound to accept that offer. This doctrine is very fully laid down in *Hylton v. Hylton* (3).

(1) In *Ward v. Baugh*, ante, vol. iv. 623, it was determined that the children were not bound by the election of their parent. Upon the general doctrine of election see the authorities referred to in the note to that case, 627, and *Wollen v. Tanner*, 218; *Wilson v. Lord John Townshend*, vol. ii. 633; *Yale v. Moseley*, *Blount v. Bestland*, post, 480, 515, and the notes, i. 523, 7.

(2) *Ante*, *Spencer v. Spencer*, 362; *Vanderzee v. Adom*, vol. iv. 771; *Kemp v. Kemp*, post, 849, and the notes, 853; ante, vol. i. 310.

(3) 2 Ves. 634.

Mr. *Manfield*, in reply. It is said, there must have been an intention, that the eldest son should have something: but it is clear, under the articles all might have been given to the younger children, exclusive of the eldest. The plan of the settlement is to limit the estate to the eldest son in tail, with a power to the father to provide for younger children: but if he chooses to do with the money what he had power to do with the land, the settlement gives it to him. It was very natural to trust him with such a power.

* Lord CHANCELLOR [LOUGHBOROUGH]. If it had stood [*448] only upon the settlement of the real estate, it would be quite impossible to say here, that the appointment, so far as regards the eldest son, was illusory (a). No question of that nature can arise, where the father appoints, and gives other provisions to the object excluded (1). This appointment is in substance exactly what he had a right to do (2) (b).

Decree according to the prayer of the bill.

1. As to the difficulty of determining what ought to be deemed an illusory appointment; see, *ante*, note 3 to *Hockley v. Maubey*, 1 V. 143; and for some of the leading rules with respect to the doctrine of election, see note 3 to *Blake v. Bunbury*, 1 V. 194, notes 2 and 3 to *Stratton v. Best*, 1 V. 285, and note 7 to *Thellusson v. Woodford*, 4 V. 227.

2. That to enable a person to sell land, it is not necessary to have that authority given to him expressly; see *Kenworthy v. Bate*, 6 Ves. 797; and *Bullock v. Fladgate*, 18 Ves. & Bea. 478.

BLOXHAM, *Ex parte*.

[1800, JUNE 21.]

A BILL indorsed by the drawer as a farther security on discounting another bill for him: the drawer and acceptor of the bill so indorsed becoming bankrupts, the proof against the estate of the acceptor, not the dividend only, was retrained to the original debt. (See note (3), p. 449.)

IN September 1799 Thomas Almond proposed to discount with the petitioners, his bankers, a bill of exchange for the sum of 342*l*. 7*s.*, at two months after date, drawn by him, and accepted by

(a) As to illusory appointments see, *ante*, 362, note (a), 368, note (a).

(1) *Ante*, *Spencer v. Spencer*, 362, and the note, 368; *Vanderzee v. Aclom*, vol. iv. 771; *Bristow v. Warde*, ii. 336; [Sugden, Powers, 4th Lond. ed. 500.]

(2) *Kenworthy v. Bate*, *post*, vol. vi. 793.

(b) See Sugden on Powers, (4th Lond. ed.) 447, where it is said, that "it is to be regretted that so important a decision as that in the case of *Long v. Long*, should have been pronounced without all the arguments which might have been adduced against it having been heard. The case of *Tankerville v. Coke*, Mosely, 146, might have been cited."

"The hasty decision of *Long v. Long*, opposed, as it appears to be, by the well considered case of *Tankerville v. Coke*, can scarcely be considered such an authority as will control any future decision, should the principle upon which it was made not be approved of." p. 448, *et seq.*

Thomas Dobson. The petitioners being unwilling to advance that sum upon the single security of that bill, Almond proposed, as an additional security, to indorse to them another bill for 459*l.* 6*s.* 10*d.*, at two months after date, drawn by him, and accepted by William Purdy; and upon his indorsing that bill they discounted the other. Neither of the bills was paid. In November last Almond became a bankrupt; and upon the 3d of October Purdy was declared a bankrupt. The petitioners applied to prove the bill accepted by Purdy for the whole amount: but the Commissioners admitted their proof only for the sum of 292*l.* 7*s.*, being the sum then actually due to them from Almond on account of the said bills. After deducting the dividends received on that proof 175*l.* 8*s.* 7*d.* remained due to the petitioners upon the bill.

The prayer of the petition was, that the petitioners may be admitted to prove under the commission against Purdy the farther sum of 166*l.* 19*s.* 10*d.*, making with the former proof 459*l.* 6*s.* 10*d.*; and that they may receive a dividend upon the sum of 166*l.* 19*s.* 10*d.*: the petitioners undertaking, in case the dividends to be received by them under both commissions shall exceed 20*s.* in the pound upon the said debt of 292*l.* 7*s.* to refund the overplus.

Mr. Cooke, in support of the Petition, cited *Ex parte* [* 449] *King* (1), and *Ex parte Crosley* (2); and observed, that the dividend only could be considered as actual payment, not the proof.

The *Attorney General*, [Sir John Mitford], for the Assignees, compared it to an attempt to prove the penalty of a bond; and said, nothing could be proved but the consideration: and if the Lord Chancellor should direct an action to be brought against the bankrupt, and that he should not set up his bankruptcy, they could not possibly recover more than the sum actually advanced.

LORD CHANCELLOR [LOUGHBOROUGH]. It is not competent to the bankrupt, from whom the bill was received, to make any objection to it: but the person, who accepts the bill without consideration, becomes a bankrupt. The proof then comes upon his estate. Then the oath to be made upon that must truly state the debt; and that is only the sum, for which the bill was given as a security. It would be impossible to recover more in an action than the sum really advanced; and it is impossible to allow more to be proved upon the estate than could be recovered upon an action directed, and the bankruptcy not to be set up.

The petition was dismissed (3).

[THIS note belongs also to 6 Ves. 449 and 600; and 8 Ves. 551.]

1. Lord Rosslyn's order, made in this matter, (which order was in contradiction of the doctrine laid down in *Ex parte Lee*, 1 P. Wms. 782,) was discharged by

(1) 1 Cooke's Bank. Law, 157, 8th edit. by Mr. Roots, 177.

(2) 1 Cooke's Bank. Law, 158, 8th edit. 177; 3 Bro. C. C. 237.

(3) This decision was over-ruled, *post*, *Ex parte Bloxham*, *Ex parte Deers*, vol. vi. 449, 600, 644; *Ex parte Parr*, xviii. 65; [see also Story, Bills of Exchange, § 192,

Lord Eldon, who held it clear, that a creditor who holds the paper of third persons, for which they are liable to his debtor, may prove, under a commission against such third persons, the whole amount of the bills, and take dividends thereon, not exceeding his own debt. So, in a later case, it was held, that in bankruptcy a creditor has a right to prove and avail himself of all collateral securities from third persons, to the extent of twenty shillings in the pound upon the actual debt. *Ex parte Bennet*, 2 Atk. 527; see note 7 to *Curtis v. Perry*, 6 V. 739. But proof upon a bill against the estate of one party liable, must be reduced, if previously to such proof payment in part has been received from the estate of another party; or (except in special cases) if a dividend from the estate of another party has been declared. *Ex parte Leers*, 6 Ves. 644; *Ex parte The Royal Bank of Scotland*, 19 Ves. 310.

2. Where there has been an *absolute exchange* of securities, with no promise of indemnity on either side in case their respective acceptances were not provided for, each party is confined to his remedy on those securities, and neither can maintain an action of assumpsit against the other in consequence of having paid his own acceptances; *Buckler v. Buttivant*, 3 East, 80; but where there has been an exchange of paper, and before the bills are mature, one of the acceptors commits an act of bankruptcy; if the other party come to prove against the bankrupt's estate, the Lord Chancellor will not allow him to receive any dividend, till his own counter-acceptances are taken up. *Sarratt v. Austin*, 4 Taunt. 208.

MORTON, *Ex parte*.

[1800, JUNE 21.]

A SPECIALTY creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt; and may therefore follow the real assets or their specific produce in the hands of the assignees. (a) The subject being small, relief was given on petition.

THE petition was presented by a specialty creditor of the uncle of the bankrupt, from whom real estates descended to the bankrupt through his elder brother. The object of the petition was to follow the real assets or their produce in the hands of the assignees; and for that purpose that an inquiry might be directed as to the specialty debts outstanding and the assets.

Mr. Lloyd, in support of the Petition, stated the rule, that the bankruptcy is not considered an alienation. In case of real estates the creditor of the ancestor may follow them and their specific produce in the hands of the assignees, if sold under the bankruptcy. The bankruptcy does not make any alteration; and the creditor has the same remedy against the assignees as against the bankrupt,

and note. It is said by Mr. Belt, in his note (1) to *Ex parte Crossley*, 3 Bro. C. C. (Am. ed. 1844,) 237, that Lord Eldon's determination in *Ex parte Blozham*, 6 Ves. jr. 449, seems irrefragible.]

(a) Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests. *Mitchell Assignee v. Winslow*, Circuit Court of U. States, Maine Oct. Term, 1843. In Bankruptcy, 6 Chandler Law Rep. 347.

Though a bill is the regular course, it has been disapproved of by your Lordship, where the subject is small.

The *Attorney General*, [Sir John Mitford], for the Assignees, admitted the rule, as stated.

Lord CHANCELLOR [LOUGHBOROUGH] assented; and made the order according to the prayer of the petition.

1. THE usual assignment in bankruptcy, like any other assignment by operation of law, passes the estate and rights of the bankrupt precisely in the same plight and condition as he possessed them. A complete legal title may be vested in the assignees, but they can only hold it subject to whatever equity, or charge, the estate may be liable to in the hands of the bankrupt. *Mitford v. Mitford*, 9 Ves. 100; *Grant v. Mills*, 2 Ves. & Bea. 309; *Ex parte Hanson*, 12 Ves. 349; *Turner v. Harvey*, Jacob's Rep. 174.

2. When a case involves no serious difficulties, proceedings by bill will not be contemplated when the object might equally be obtained by petition, in bankruptcy; see, *post*, note 3 to *Saxton v. Davis*, 18 V. 72.

WRAGG, *Ex parte*.

FERNE, *Ex parte*.

[1800, JUNE 20, 28, 30.]

UPON a search of precedents it was held no objection to the return to an Inquisition, finding a person lunatic, that it does not state, that the lunatic has or has not lucid intervals.

A traverse to the return to an Inquisition, finding a person lunatic, is a right by law; though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse, [p. 450.]

Manner of pleading a traverse to an Inquisition, finding a person lunatic, [p. 452.]

A COMMISSION in the nature of a writ *De lunatico inquirendo* had issued; to inquire of the lunacy of Ann Goodwin, otherwise Ferne. Upon the 2d of October, 1799, she left the family of the Wraggs, her relations, with whom she had lived; and married William Ferne. The jury, before whom the inquisition was taken, consisted of seventeen; of whom twelve joined in the verdict, that she was at the taking of the inquisition a lunatic and of unsound mind; and hath been in the same state of lunacy for the space of six years and upwards. The other five refused to join in the verdict. There was a great deal of contradictory evidence.

The first petition was presented by the family of the Wraggs; praying, that the report may be confirmed, approving of Thomas Wragg, son of Ann Wragg, aunt and one of the next of kin and co-heirs at law of the lunatic, as committee.

A counter-petition was presented by William Ferne and his wife; praying, that a new commission may issue to inquire of the lunacy, and whether she was a lunatic at the time of the marriage; or that the petitioners may be allowed to traverse the Inquisition.

An objection was taken to the return, as irregular in not finding, whether the lunatic had or had not lucid intervals. It was stated by affidavit, that the commissioners did not state that to the jury; that the foreman took no notice of it; and it was not omitted by accident, but in a conversation for settling the Inquisition *some discourse arose about the insertion of the fact, [*451] whether the lunatic had lucid intervals; and the deponent heard one of the commissioners say, it was better not to insert it at all; and believes, it was therefore omitted in the presence of the greater part of the jurors, and the deponent thinks of all of them.

The *Attorney General* [Sir John Mitford] and Mr. Hart in support of the objection to the return contended, that it was irregular in not finding, whether the lunatic had or had not lucid intervals. They observed, that there would be great difficulty in traversing this.

The *Solicitor General* [Sir William Grant] and Mr. Fonblanque, in support of the Return. This return is sufficient. The question is, whether this person was or was not a lunatic. The other question is only inducement. Lunacy is a partial insanity; and implies lucid intervals. It is incumbent upon those, who are to support this act, to show, that it took place during a lucid interval. The great object of the Commission is to ascertain, whether the party is or is not capable of governing his affairs. *Ex parte Barnsley* (1). *The Attorney General v. Parther* (2).

The Secretary for Lunatics, being referred to by the Lord Chancellor, said, the usual course is to find, that the person either does or does not enjoy lucid intervals.

LORD CHANCELLOR [LOUGHBOROUGH]. If the course is to find expressly, whether the person does or does not enjoy lucid intervals, this Inquisition is not returned in the usual form; for I cannot take it to be found either way. I consider it as not having in express terms but by implication negatived lucid intervals. I will direct an inquiry, to see, whether there has been a uniform course.

June 28th. LORD CHANCELLOR [LOUGHBOROUGH]. I have caused a search to be made; and in *Ex parte Barnsley* no objection was taken on this ground. The point of the traverse is, that he was of unsound mind. This return is certainly according to the course. Of all the numerous references in that case very few state, whether the party had lucid intervals. *There- [*452] fore all I can do in this case is to allow the traverse. I think, it is of right. It is matter of right at law (3) (a). When they take their traverse upon it, I can do nothing but carry the record to the Court of King's Bench. Lord Hardwicke says in *Barns-*

(1) 3 Atk. 168, 184; *Ex parte Roberts*, 3 Atk. 5.

(2) 3 Bro. C. C. 441.

(3) Stat. 2 Edw. VI. c. 8, s. 6; *post*, *Ex parte Ward*, vol. vi. 579; *Ex parte Hall*, vii. 261; *Ex parte Sherwood*, xix. 280. See a traverse to an Inquisition under a Commission of Escheat, *post*, *Ex parte Webster*, vi. 809.

(a) See *Wendell's Case*, 1 Johns. Ch. 600; *Hank's Case*, 3 Johns. Ch. 567; *M'Clean's Case*, 6 Johns. Ch. 440; 2 Story, Eq. Jur. § 1365.

ley's Case, he will do nothing upon it: but if the parties have a right by law and under the Statute to traverse, which I think they clearly have, they may take that method. I cannot say, upon the evidence I am dissatisfied with the finding: but the traverse is of right. All I can do, and think discreet to do, is to suspend the order; for, supposing, upon the traverse she is found *compos mentis*, I cannot take her property (a).

June 30th. The petitions stood over for farther consideration to this day, when the Attorney General admitted, he could suggest no other course than a traverse.

The Solicitor General [Sir William Grant] desired, that the time might be limited,

Lord CHANCELLOR [LOUGHBOROUGH]. It can be done immediately; and I can carry it into the Court of King's Bench to-morrow or the last day of Term. The pleading a traverse is exceedingly short. You merely state the Inquisition, take the common traverse upon it, and the Attorney joins issue (1) (b.)

[THIS note belongs also to *Ex parte Ferne*, post, 832.]

1. A traverse to an inquisition in lunacy, upon the application of the party himself, (or of his alienees who have acted *bona fide*; *Ex parte Hall*, 7 Ves. 263,) is not granted or refused at the discretion of the Court; it is matter of undoubted right. *Sherwood v. Sanderson*, 19 Ves. 284, 287. And by the statute 8 Hen. VI. c. 16, the custody of the estates of persons found *non compos* is not to be granted till one month after the return of the inquisition; in order to give the party an opportunity of traversing the verdict. The statute 1 Hen. VIII. c. 60, permitted any person to tender a traverse to the office within three months who offered security according to that statute: and the recent statute 6 Geo. IV. c. 53, contains farther regulations to a similar effect. But, after the limited times are past, a traverse is not a matter of right; the applicant may be directed to try a general issue. *Ex parte Sir Benjamin Wright*, 1 Vern. 154; *Clerk v. Clerk*, 2 Vern. 714. And this direction will generally be given when it is a *second* commission, clearly finding the party to be *non compos*, which is sought to be set aside; *Ex parte Holyland*, 11 Ves. 12; for, by allowing repeated traverses the proceedings might be spun out most injuriously. *Ex parte Barnsley*, 3 Atk. 185.

2. Where the object is rather to establish a lucid interval, than to negative the fact that the party ever was deranged, an issue is more advisable for his interest than a traverse; since, upon the trial of an issue the question may be gone into at large; whereas, as stated in the principal case, a traverse is confined to the facts found by the inquisition. *Hall v. Warren*, 9 Ves. 609; and see *Brogden v. Brown*, 2 Addams, 445.

3. A person found by office an idiot can only tender a traverse personally; a lunatic, with permission of the Court, may do this by attorney; *Ex parte Roberts*, 3 Atk. 7; but at the trial of the traverse he must, of course, appear in person. *Ex parte Southcote*, 2 Ves. Sen. 406.

4. Since the Crown, as was intimated in the principal case, cannot take possession of the property of a *non compos* after he has traversed the inquisition; it follows, that if such traverse be successful, there is no fund out of which the Court can give the party who took out the commission his costs, however praiseworthy his motives may have been. *Sherwood v. Sanderson*, Coop. 108; *Ex parte Glover*, 1 Meriv. 270.

(a) At the time of directing an issue to settle the question of lunacy, the Court will, if necessary, make a provisional order for the care of the lunatic's estate, until the question is determined. *Wendell's Case*, 1 Johns. Ch. 600.

(1) *Post*, *Ex parte Ferne*, 832.

(b) See 2 Madd. Ch. Pr. (4th Am. ed.) 735, 736, 737.

5. The principal case was an authority, that when upon the trial of a traverse, the jury returned an irregular verdict, the only mode of giving relief to the party was by superseding the commission; even if it appeared proper to issue another; *Ex parte Cranmer*, 12 Ves. 454; but now the 3d section of the statute of 6 Geo. IV. c. 53, authorizes the great officer to whom the administration of the prerogative of the Crown, with its concomitant duties, in matters of lunacy is confided, to order a new trial, if he shall be dissatisfied with any verdict returned upon a traverse. When, however, there is any misconduct, (not in the trial of a traverse, but) in the execution of an inquisition, a *melius inquirendum* issues only for the Crown; if a subject be aggrieved he must traverse; or the Court, if it see cause, may quash the inquisition, and issue a new commission. *Ex parte Roberts*, 3 Atk. 6; *Ex parte Atkinson*, Jacob's Rep. 334. And, after a questionable verdict, upon the trial of a traverse, the Lord Chancellor may think it inexpedient to direct farther proceedings, when it appears that the necessary protection may be afforded to the party, by making an order, restraining him from doing certain acts, except in the manner directed by the order. *Ridgway v. Darwin*, 8 Ves. 66. For it seems, (though Lord Hardwicke once intimated a contrary opinion, see, *ante*, the note to *Eyre v. Wake*, 5 V. 450,) it is discretionary in the great officer who administers this branch of the prerogative to grant or to refuse a commission of lunacy, even when unsoundness of mind is clearly established; *Ex parte Atkinson*, Jacob's Rep. 335; and it will never issue when there is good ground for believing the measure would defeat the party's cure. *Ex parte Tomkinson*, 1 Ves. & Bea. 59. With the same consideration for the welfare of persons supposed to labor under mental visitations, the access of medical men, or other proper persons, may be directed, without issuing a commission, either for the purpose of ascertaining the real state of their minds, or for preventing any imposition being practised upon them. *Ridgway v. Darwin*, 8 Ves. 65; *Rex v. Wright*, 2 Burr. 1099. But, as such visits, if not delicately conducted, might have the effect of irritating the mind of the supposed lunatic, access will only be granted upon strong reasons, and not upon the principle of *quia timet*. *Ex parte Littleton*, 6 Ves. 7.

6. If derangement be alleged against any one, as the foundation of a commission, it is clearly incumbent on the person who makes that allegation to prove the same; on the other hand, if the derangement be proved, or be admitted, to have existed at any time, but it is contended that a lucid interval either actually exists, or did prevail at any particular period, then the burthen of proof attaches on the party alleging such lucid interval. *Attorney General v. Parnter*, 3 Brown, 433; *White v. Wilson*, 13 Ves. 88; *Cartwright v. Cartwright*, 1 Phillim. 100. But in cases where the fact of lunacy, at a particular time, has been established, the party may be restored to a state of mind, which, though inferior to what he possessed before, may be such as would not make it proper to support a commission against him. *Ex parte Holyland*, 11 Ves. 11. There may be cases, however, in which it would be more prudent to suspend, than to supersede, a commission once issued; although the party, at the time of petitioning for such relief, may appear to be perfectly recovered; and this course would be proper, more especially, when he was found by the inquisition to be a lunatic with lucid intervals. *Ex parte Ferrars*, Mosely, 332; *Mrs. Ash's case*, 2 Freem. 259.

LEGH v. HAVERFIELD.

[1800, JULY 1.]

BILL for specific performance of an agreement dismissed: the agreement appearing from letters produced to have been different from that set up by the bill and proved by one witness.

Portions by a marriage settlement, to be paid, transferred or assigned, to the sons at twenty-one, to the daughters at twenty-one or marriage, if after the decease of their parents; with survivorship among them, if any should die, before the share or shares should become payable, assignable or transferable; and a limitation over, if there should be no child or children living at the death of the survivor of the parents, or, being such, all should die, before the fund should become so as aforesaid payable, assignable or transferable. Whether a child attaining twenty-one takes a vested interest in the life of the parent, *quære*, (a) [p. 453.]

By settlement after the marriage of John Rowlls and Elizabeth Legh, dated the 8th of October, 1757, it was agreed, that 5000*l.*, covenanted to be paid by John Rowlls, should be vested in trustees; upon trust, to invest the same in Government or real securities, and pay the interest to John Rowlls, for life, and after his decease to Elizabeth Legh for life; and after the decease of the survivor, as to 500*l.* for him, his executors, &c.; and as to 4500*l.* in trust for the benefit of all and every the child and children of John Rowlls [*453] on the body of the said *Elizabeth, his then wife, begotten or to be begotten, born in his life-time or after his death, and, if more than one, equally to be divided between and among them share and share alike, and to be paid or transferred to him, her, or them, at such time or times, as hereinafter mentioned: that is to say, as to the share and shares of such child or children, being a son or sons, as when he and they should severally attain his and their age or ages of twenty-one years; and the share and shares of such child and children, being a daughter or daughters, as and when she and they should severally attain the age of twenty-one years or be married, which should first happen: but nevertheless, if any such son or sons should attain the age of twenty-one, or any such daughter or daughters should attain that age or be married in the life-time of the said John Rowlls and Elizabeth, his wife, or the survivor of them, then the share and shares of such son and sons so attaining such age, and of such daughter and daughters so attaining such age or marrying, in the life-time of John Rowlls and Elizabeth, his wife, or the survivor of them, were not to be paid, assigned, or transferred, to him, her, or them, till the decease of the survivor of the said John Rowlls and Elizabeth, his wife; and then to be paid, transferred, or assigned, to him, her, or them, respectively; and it was provided, that if any such child or children should die, before

(a) In case of doubt vested rather than contingent interests are favored. *Olney v. Hull*, 21 Pick. 311, 314; *Dingley v. Dingley*, 5 Mass. 535; *Bowers v. Porter*, 4 Pick. 198; *Shattuck v. Stedman*, 2 Pick. 468, 469; *Davosen v. Killett*, 1 Bro. C. C. (Am. ed. 1844,) 119-125, and notes.

his, her or their, share or shares in the said principal sum of 4500*l.* or the securities, wherein the same or any part thereof might be invested, should become payable, assignable, or transferable, to him, her, or them, then the share or shares of him, her, or them, so dying, of and in the principal sum and the securities for the same should go and accrue to the survivors and survivor, or others, or other, of such children, and go and be paid, assigned, and transferred, to him, her, or them, if more than one, equally share and share alike, at such time or times, and in the same manner, and under such restrictions, to such surviving or other child and children then in being, as was therein before expressed touching his, her, and their, original share and shares; and in case of the death of any other or others of such children, before such accruing or surviving share or shares should become payable, assignable, or transferable, then every such surviving share or shares should be again subject and liable to such farther right of chance and condition of accruer or survivorship to the then survivors or survivor or others or other of them, as was before * declared concerning their original shares; [* 454] with a power to the trustees in case of the death of the survivor of Rowlls and his wife, leaving any child under age to apply the interest of the said 4500*l.* to the maintenance of such infant child. It was farther provided, that, if there should be no child or children of Rowlls and his wife living at the time of the death of the survivor, or being such, all of them should die, before the whole of the said 4500*l.* or the securities for the same should become so, as aforesaid, payable, assignable or transferable, to him, her, or them, or some of them, as aforesaid, then the trustees should be possessed of and interested in all or so much of the said principal sums and the dividends and interest thereof as should not so, as aforesaid, become payable, assignable, or transferable, to any such child or children, in trust for John Rowlls, his executors, administrators, and assigns.

By the same settlement a term for years in certain lead mines with all the profits thereto belonging was vested in the same trustees, upon trust to sell, and invest the produce in securities, in trust to pay the interest and dividends to John Rowlls for life, then to Elizabeth Legh for life, and after the death of the survivor upon similar trusts for the children, with the ultimate limitation for the survivor of Rowlls and his wife absolutely.

Another sum of 3000*l.* secured upon a mortgage for 500 years, was also settled by Charles Legh and Thomas Legh for the separate use of Elizabeth Legh; and after her death upon similar trusts in favor of the children; with the ultimate limitation to Charles Legh, his executors, &c. (1).

John Rowlls died in 1779; leaving his wife surviving him, who was his executrix; and three sons: John Legh Rowlls, William

(1) The settlement as to this fund is more particularly stated, *post*, vol. ix. 300, 301.

Peter Legh Rowlls, Charles Edward Legh Rowlls; and one daughter, Elizabeth. John Legh Rowlls and Elizabeth attained the age of twenty-one in the life of their father; and the latter with the consent of her father married her first husband Thomas Brown Calley. William Peter Legh Rowlls attained the age of twenty-one in 1780; and died in June, 1794; leaving Elizabeth his widow and executrix; who afterwards married John Jaques Schenk. Charles Edward Legh Rowlls having attained twenty-one, died in 1795 unmarried. John Legh Rowlls also died. The sons had been [* 455] dissipated *young men, living abroad in distress. Elizabeth, the daughter, after the death of her first husband, having a very slender provision, married Thomas Haverfield.

The bill was filed by Elizabeth Legh, the widow of John Rowlls, and on behalf of the infant daughter of John Legh Rowlls; praying, that an agreement entered into by the Defendant Elizabeth Haverfield and by John Legh Rowlls and Charles Edward Legh Rowlls may be established. The bill stated, that upon the death of William Peter Legh Rowlls it was apprehended to be very doubtful, whether according to the settlement the shares in the said sum of 4500*l.* and of the produce of the lead-mines and office of Barmaster (thereto belonging) vested in such of the children as should die in the life of the Plaintiff Elizabeth Legh, and would not accrue to the surviving children, notwithstanding a child dying in her life should have attained twenty-one, and should have been married; and the agreement took place in consequence.

Sir George Chad by his depositions stated the agreement to be, as alleged by the bill, that the shares of the then survivors in the settled property should be considered as vested interests in them notwithstanding any of their deaths in the life of their mother, in order that the same might pass to their personal representatives; and also, that Elizabeth Legh should out of such settled property pay Elizabeth Schenk an annuity during the life of her mother; and that they would continue it afterwards until her own death; and to the best of his remembrance and belief the sum of 150*l.* per annum.

The following extract of a letter written by Elizabeth Haverfield during her widowhood to her brother Charles Edward Legh Rowlls, was produced as evidence of the agreement:

"What my brother meant was, in case he outlived my mother. You know, my dear Charles, we agreed among ourselves, that the Derbyshire affairs should go the manner we wished to obtain an Act of Parliament for; that, if either of us died before our father or mother, leaving children, they should inherit our shares. This agreement was made among ourselves; and though it was never drawn up in form by writing, yet to me it is as binding. I have [* 456] five children; and should think it hard *indeed, if they had lost their mother before their grandmother, that they were not entitled to that part of my fortune; and I am sure, you will think the same."

Two other letters were read as evidence of the agreement; one

from Charles Edward Legh Rowlls to his mother; from which he appeared to consider the agreement to be, that the children of a deceased child should stand in the place of the parent.

The Defendants Haverfield and his wife by their answer denied the agreement; stating, that it never went beyond treaty, and had been abandoned; and that the 150*l.* per ann. paid to Mrs. Schenk was paid by the mother out of her own property or income.

Attorney General, [Sir John Mitford], *Solicitor General*, [Sir William Grant], and Mr. Hart, for the Plaintiffs. The agreement is evidenced by this letter beyond all possibility of doubt; and it has been acted upon by the payment of the annuity to Mrs. Schenk. The construction of the settlement is certainly subject to considerable doubt; though it seems to be, that the shares vested. But the doubt is the strongest ground for contending, that the agreement was binding.

The construction of the settlement ought to be the same as in *Emperor v. Rolfe* (1) *Cholmondeley v. Meyrick* (2) and *Willis v. Willis* (3), in which your Lordship proceeded upon the two former cases; holding the portion vested, as due and payable; though not to be actually paid till after the death of the father. There can be no difference between the words "due" and "payable" and the words in this settlement "payable, assignable or transferable." The meaning is precisely the same. The reason in all these cases is, that the money is considered immediately payable, though not to be actually paid, till the time arrives, when it is to be distributed. The direction, that in case there should be no children living at the death of the survivor of Rowlls and his wife the trust should be for such survivor as to the produce of the mines, which have produced a large fund from the accumulation, and for Rowlls as to the other fund, certainly makes the whole liable to be *defeated by [*457] that contingency: but that alone will not prevent it from being transmissible according to a variety of cases.

Mr. Mansfield, for the Defendant. In this settlement words are to be found, that have not occurred in any other case. In *Cholmondeley v. Meyrick* and the other cases the word "payable" was held to relate to the age of twenty-one or marriage, not to the actual payment: but in this instance that is an impossible construction without striking out words, which clearly must prevent the vesting during the lives of the father in one instance and of the survivor of the father and mother in the other: viz. the words "assignable or transferable" in the gift over. The fund never could be assignable or transferable to the children till the death of the persons entitled to the interest for their lives. However absurd such a settlement may be, proceeding perhaps from the inattention of the person, who drew it, it would be impossible to construe it otherwise without striking out those words.

(1) 1 Ves. 208.

(2) 3 Bro. C. C. 252, n.

(3) *Ante*, vol. iii. 51; [note (a)]; see the note, 55.

But we are now upon the agreement ; the bill proceeding only upon that, not upon the construction of the settlement ; the Defendants deny, that any conclusive agreement was made to this effect. It was proposed ; and rested in honor merely. Upon this attempt the common observation arises : how dangerous it is to decide upon agreements proved by parol. As to the most valuable part of the property, the mines, no agreement would do, that was not in writing ; and in the letter she speaks only of the Derbyshire affairs. The letters are of a very different import from the evidence of Sir George Chad.

LORD CHANCELLOR [LOUGHBOROUGH]. What agreement am I to execute ? They are so widely different : the agreement spoken of by Sir George Chad, and set out in the bill, and the agreement in these two letters, in which it is understood to be, that the children should stand in the place of their parents ; and if it was, as the bill contends, to give vested interests, it would defeat that. I cannot upon this bill, stating that agreement, decree a specific performance of an agreement, that the children should stand in the place of their parents ; and that a child dying without issue should have no share.

The bill was dismissed (1). —

[THIS note also belongs to *Schenk v. Legh*, 9 Ves. 300.]

1. That, as a general rule, a plaintiff who has set up one agreement by his bill, cannot obtain performance of a different agreement, though such different agreement be admitted, or proved, see, *ante*, note 3 to *Mortimer v. Orchard*, 2 V. 243.

2. As to the inclination of Courts of Equity to declare interests, settled upon children, *vested*, although such interest may not be to take effect in possession until after the death of both their parents, see note 1 to *Willis v. Willis*, 3 V. 51.

3. The circumstances shown in *Bayard v. Smith*, 14 Ves. 476, were exactly like those of the principal case, and a similar decree was there pronounced.

[* 458]

MAINWARING v. BAXTER.

[ROLLS.—1800, JULY 4.]

TRUST by deed, creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, (a) and inconsistent with the rights of the tenants in tail. (b)

A conveyance decreed, subject to an annuity, charged on the estate ; the annuitant having gone to Newry in Ireland sixteen years ago ; and no payment made, or account obtained of her, since, (c) [p. 458.]

By indentures of lease and release, dated the 21st and 22d of September, 1770, it was witnessed, that for settling and assuring the

(1) *Lindsay v. Lynch*, 2 Sch. & Lef. 1 ; *Mortimer v. Orchard*, *ante*, vol. ii. 243, [and notes.]

(a) See, *post*, 460, note (a).

(b) See *Bradley v. Peizolo*, *ante*, 3 V. 324, note (a).

(c) Where no account can be given of the existence of a person, the presump-

real estates therein mentioned upon the uses and trusts after declared, and to the intent, that the same might continue in the possession of some of the name and family of the Mainwarings, and in consideration of 10*s*. Charles Mainwaring conveyed unto Robert and Thomas Baxter, their heirs and assigns, certain estates in the counties of Chester and Lancaster, to hold to the use of them, their heirs and assigns, for ever, in trust to the use of Charles Mainwaring and his assigns for his life; and after his death to the use, that Margaret Bayley and her assigns should during her life receive the yearly sum of 30*l*.; and after the decease of Charles Mainwaring, charged as aforesaid, to the use of trustees for 1000 years, subject to the uses, trusts and conditions, after mentioned; and, after the determination of that term, to the use of Sir Henry Mainwaring for 99 years, if he should so long live; and after the determination of that estate, to trustees during his life to preserve contingent remainders: remainder to his first and other sons in tail male; with similar remainders to Edward Mainwaring and his first and other sons and to Roger Mainwaring and his first and other sons; and for default of such issue to the use of Charles Mainwaring of Bromborough in the county of Chester, his heirs and assigns for ever.

It was declared, that the term of 1000 years was so limited to the intent and purpose, that all and every the person and persons (other than the said Charles Mainwaring, party thereto,) on or to whom any estate or interest in the said premises was thereby before settled or intended, might be content to accept the same in such manner as the same was in and by the said indenture before limited and appointed; and that it should not be in the power of them or any of them to anticipate, prevent, or destroy, the trust estate or benefit of him or them appointed to succeed; and it was declared, that the trustees, their executors, &c. should or might after any contract or agreement made touching alienation of the premises or any part thereof, but before any alienation should be actually made, or any act, matter, or thing, done, which might amount or be construed to *prevent the said premises or the trust thereof [*459] from going, remaining, coming, or being, according to the limitations aforesaid, by sale or mortgage of all the said premises for and during the remainder of so much of the said term as should be then to come, or of a competent part thereof, raise the sum of 5000*l*., or proportionably, according to the shares and proportions

tion of the duration of life ceases at the expiration of seven years from the time when he was last known to be living. 1 Phil. Ev. (Cowen & Hill's ed.) 197, and note 381, to 2 vol. Cowen & Hill's notes, p. 489; 2 Steph. N. P. 1555, 1556; 1 Greenl. Ev. pt. 1, ch. 4, § 41; *King v. Paddock*, 18 Johns. 141; see *McComb v. Wright*, 5 Johns. Ch. 263; *Doe v. Nepean*, 5 Barn. & Adol. 86.

It is not necessary that the party should be proved to have been absent from the United States; it is enough if it appears that he has been absent for seven years, from the particular State of his residence, without having been heard from. *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rawle, 373; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Wambaugh v. Shenk*, 1 Penning. 167; *Woods v. Woods*, 2 Bay, 476; see 2 Williams, Executors, (2d Am. ed.) 1018, 1019.

of the premises, that should be contracted or agreed to be sold, as aforesaid, or otherwise enter in and upon the said premises, and keep the same, until the said 5000*l.* or such proportion thereof, as aforesaid, with interest at 5 per cent., should be fully satisfied and paid; and until the raising of such sum should raise out of the rents and profits the yearly sum of 500*l.*, or proportionably, according to the value of such part as should be contracted to be sold, and pay the same unto such person or persons respectively as would from time to time be entitled to the premises, in case such person or persons contracting to aliene the premises were actually dead, or as would from time to time or for the time being be injured or intended so to be by any alienation, act, matter, or thing, in case the person or persons so contracting or agreeing to aliene were actually dead; and after raising the said 5000*l.* or such proportion thereof, as aforesaid, should place out the same at interest, and from time to time yearly pay such interest to such person or persons so injured or disappointed by such alienation, act, matter, or thing, or intended so to be, other than the person or persons so contracting or agreeing to aliene; and that the said principal sum of 5000*l.* or such proportion thereof and interest, as aforesaid, should be reserved and employed for the benefit of such person or persons respectively and successively, to whom the estate, use and trust, of the said premises according to the true intent and meaning of the aforesaid limitation is appointed, other than the person or persons so contracting, &c. as aforesaid; and after raising the 5000*l.* or such proportion thereof and interest, as aforesaid, with costs of the trustees, the term should cease.

The deed contained a power to Charles Mainwaring by deed or will to revoke the uses and appoint new uses.

Charles Mainwaring, having disposed of the Cheshire estates, died in September, 1770. Sir Henry Mainwaring entered [*460] upon the *Lancashire estates and died without issue in 1797. Edward Mainwaring died in 1795, leaving two sons.

The eldest son of Edward Mainwaring, having suffered an equitable recovery to the use of himself and his heirs, filed the bill; praying that he may be declared entitled to the legal estate, discharged of the trusts of the term, and a conveyance.

The Plaintiff had no issue male. The Defendant William Mainwaring was his younger brother. The last payment of the annuity to Margaret Bayley was made in 1786; about which time she went to Newry in Ireland; and no account of her had been since obtained.

The MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN], when the trust was stated, said, it was a mere device to prevent alienation; which was attempted in *The Duke of Marlborough's Case* (1) upon very great advice; and the House of Lords had no difficulty in affirming Lord Northington's decree.

(1) *Spencer v. The Duke of Marlborough*, 5 Bro. P. C. 592.

Mr. *Piggott*, for the Plaintiff, observed, that the express object in this case is to prevent the destruction of the estates; and referred to the cases of this sort collected by Mr. *Fearne* (1).

No attempt was made to support this trust.

MASTER OF THE ROLLS. I shall adopt the words of Lord Northington in that case. Declare the trusts of the term of 1000 years, as tending to a perpetuity, and, being inconsistent with the rights of the several persons, to whom estates in tail are limited by the said deed, are void and of no effect (a).

The decree then directed an assignment of the term of 1000 years to the Plaintiff, or as he should direct, and a conveyance, subject to the term of 99 years to secure the annuity to Margaret Bayley.

With respect to the law's abhorrence of perpetuities, see, *ante*, *Blandford v. Thackerell*, 2 V. 238, and the farther references there given: and that no device to restrain a tenant in tail from exercising his power of alienation will avail, see *Bradley v. Peizoto*, 3 Ves. 325; *Britton v. Twining*, 3 Meriv. 184.

(1) *Fearne's Cont. Remainders*, 379 to 390, 4th edition; see also, *ante*, *Bradley v. Peizoto*, vol. iii. 324, and the case upon Mr. Thellusson's will, iv. 227. The extent, to which the accumulation was carried by that will, produced the Act of Parliament 39th & 40th Geo. III. c. 98, restraining dispositions by way of accumulation to the life of the settlor, or twenty-one years after his decease, or the minority of any party living at his decease, or of persons entitled under the instrument to the rents, interest, or annual produce, directed to accumulate. See *post*, *Griffiths v. Vere*, vol. ix. 127; *Longdon v. Simson*, xii. 295.

(a) See, for the law on the subject of perpetuities and limitations void for remoteness, *Kevern v. Williams*, 5 Sim. 171; *Hawley v. James*, 5 Paige, 318; S. C. 16 Wendell, 61; *De Peyster v. Clendenning*, 8 Paige, 295; *Hone v. Van Shaick*, 7 Paige, 221; S. C. 20 Wendell, 564; *Van Vechten v. Van Vechten*, 8 Paige, 104; *Cadel v. Palmer*, 1 Clark & Fin. 373; S. C. 10 Bingh. 140; 4 Kent, (5th ed.) 17, 266, 267, 271, *et seq.* and notes; *Nightingale v. Burrell*, 15 Pick. 104; *Hawley v. Northampton*, 8 Mass. 3, 37, 38; *Bengough v. Edrige*, 1 Sim. 173, 267; *Postele v. Postele*, 1 Bai. Eq. 390; *Mazyck v. Vanderhorst*, 1 Bai. Eq. 48; *Butler v. Butler*, 1 Hoff. 344; *Bland v. Williams*, 3 My. & Keen, 411; *Lynch v. Hill*, 6 Munf. 114. Where a testator directs the accumulation of a fund to commence at a time subsequent to his decease, the accumulation becomes void at the expiration of twenty-one years from his decease, although at that period there has been on the whole less than twenty-one years of accumulation. *Webb v. Webb*, 2 Beav. 493; see *Newman v. Newman*, 10 Sim. 51; *Judd v. Judd*, 3 Sim. 525.

BARTON v. COOKE.

[ROLLS.—1800, JULY 5.]

LEGACIES declared specific upon clear words; and an abatement of the general legacies directed. (a)

The general personal estate not specifically bequeathed applied first in payment of all the costs, (b) except of inquiries as to a guardian and maintenance for a specific legatee, and then to the general legacies, [p. 461.]

Legacy for the board and education of an infant, until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee; the infant, having attained 19, and not having been put out, was held entitled to the legacies, [p. 461.]

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way; as, if it was to put him into orders; and he became a lunatic, [p. 463.]

JOHN COWLING by his will gave the following legacy: "I give and bequeath unto my natural son John Cowling Barton now an infant son of Mrs. Elizabeth Barton now living with me, 3000*l*. Stock in the 3 per cent. Consols Bank Annuities being part of my Stock now standing in my name in the Company's books to be transferred to him by my executors hereafter named or the survivor of them when he shall attain the age of twenty-one years the interest thereof in the mean time to be paid and applied towards his education and bringing up."

The testator then directed, that his mother should have the sole care and management of him until the age of nine years; at which time the executors should place him at school, the expenses thereof not to exceed 50*l*. a-year; and he gave to Elizabeth Barton the sum of 40*l*. a-year, to be paid her half-yearly by his executors, until his said natural son should attain the age of nine years; and from and after that time he gave her an annuity of 40*l*. a-year; to be paid to her by half-yearly payments by his executors out of his personal estate for her life. He then gave his sister Ann Copeland an annuity of 30*l*. a-year, to be paid her by half-yearly payments by his executors for her life out of his personal estate; and at her decease he gave

(a) The distinction between general and specific legacies is very important; one reason for which appears in the present case. See 2 Williams, Executors, (2d Am. ed.) 838, 839.

The late decisions have leaned much against specific legacies, requiring a clear indication of intention to make a legacy specific. *Cogdel v. Cogdel*, 3 Desaus. 373; *Walton v. Walton*, 7 Johns. Ch. 258; *Bradford v. Haynes*, 20 Maine, 107; *Smith v. Lampton*, 8 Dana, 69; 2 Williams, Executors, (2d Am. ed.) 840; *Fbole*, Appt. 22 Pick. 299, 302; *Briggs v. Horsford*, 22 Pick. 288, 289; *Raymond v. Broadbelt*, ante, 199, and notes; *Ashburner v. Macguire*, 2 Bro. C. C. (Am. ed. 1844,) 114, note (i). For cases where the distinction between general and specific legacies is farther discussed, see *post*, 463, note (b).

As to the abatement of legacies, see 2 Williams, Executors, (2d Am. ed.) 972, *et seq.*; *White v. Beattie*, 1 Dev. Eq. 320; *Snow v. Callum*, 1 Desaus. 542; *Wood v. Vanderburgh*, 6 Paige, 278; *Duncan v. Tobin*, C. W. Dud. Eq. 161; *Dovell v. Wilson*, 1 Coop. Temp. Brough. 504.

(b) See 2 Williams, Executors, (2d Am. ed.) 980, 981, and notes; 2 Macpherson, Infants, (Lond. ed. 1842,) 394.

the said moneys so secured for the payment of the said annuity of 30*l.* to his said natural son to and for his own use when he shall attain his said age of twenty-one years : the interest thereof in the mean time to be applied in such manner as the executors shall judge proper for his own use and benefit. The testator then made the following disposition :

“ Also I give and bequeath unto the said Elizabeth Barton all and singular my household goods household furniture jewels plate pictures horses chaise linen woollen and all other movables in my said house and premises to and for her sole use and disposal.”

Then, after devising the house and premises, in which he lived, to Elizabeth Barton for life, and after her decease to her son James Barton in fee, and giving some pecuniary *legacies, [*462] and, in case John Cowling Barton shall die before the age of twenty-one, to James Barton 20*l.* a-year for his life, he directed, that his executors do pay out of his personal estate the sum of 100*l.* for the board and education of the said James Barton until he shall be fit to put out apprentice ; and that they do then pay the farther sum of 100*l.* with him as an apprentice fee. He then disposed of the residue thus :

“ All the rest residue and remainder of my moneys that shall be remaining after the several annuities and legacies above given and bequeathed and my debts and funeral expenses and the proving of this my will shall be fully paid and satisfied I give and bequeath the same unto my relations and friends hereafter named ” (naming them) “ equally to be divided between them share and share alike as the said moneys shall from time to time fall into the hands of my executors to be divided as aforesaid.”

Elizabeth Barton, and two other persons, to whom the testator had given legacies of 30*l.* each, were appointed executors.

The bill was filed on behalf of the infant John Cowling Barton ; and the usual decree was made for taking the accounts.

By the Report it appeared, that the Stock consisted of 3751*l.* 17*s.* 9*d.* From the result of the accounts it became material to ascertain, whether the legacies were specific ; an abatement appearing necessary. The cause coming on for farther directions, the questions were, first, whether the bequest of 3000*l.* Stock to the Plaintiff was specific.

Secondly, as to the two sums of 100*l.* each, bequeathed for the benefit of the Defendant James Barton : the Report stating, that he has attained the age of nineteen, and has not been put out an apprentice.

Mr. *Romilly*, for the Plaintiff said, there could be no doubt, his legacy was specific.

Mr. *Pemberton* and Mr. *Wear*, for the Defendants. Upon the face of the will this primary, apparent, specific quality is done away ; for the words “ personal estate ” can apply only to this stock stated in the Report ; for he had no other personal estate, except the household furniture. The disposition of that is

as much specific as the other. Upon the residuary clause the testator must be supposed to intend, that all his legacies should be paid. Suppose, he had sold out 3000*l.* of his Stock; the executor would have been bound to replace that; because all the residue of his moneys remaining, after the annuities and legacies above given shall be fully paid, is given over.

Upon the other question, James Barton is entitled to these legacies of 100*l.* each. It was the fault of the executors, that he was not put out apprentice.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. There is a case in point in *Vernon* (1); where it was held, that if a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way. Suppose, it was given to put him into orders; and he became a lunatic.

Upon the other point, I wish I could go along with the Defendants. A great deal may be urged as to the intention; to show, that the testator had no idea of the consequence and nature of a specific legacy. But upon this will and the report is there any ground to say, that this is not specific; being clearly so according to every determination upon the words? Looking into the personal estate, it is almost inconsistent, that these words should have that meaning, that upon the plain words would be understood. But it is not contended to be absolutely impossible, but only improbable; for a man by his personal estate does not mean at the time of making his will, but at his death; (a) and it never has been the rule to consider, whether a man had enough at his death to answer all the legacies. The only question that can be asked, is, what upon the face of the will is the construction; for we must not argue from the absurdity. No doubt, if he had so much Stock, it would be specific. (b) The consequence supposed by the Counsel for the Defendants would not follow. If the testator had sold out part of his Stock, the executors would not have had to replace it: but it would have been adeemed. (c) This therefore is as much a specific bequest of an *al-*

(1) *Barlow v. Grant*, 1 Vern. 255; *Hammond v. Neame*, 1 Swanst. 35; *Lecke v. Lord Kilmorey*, 1 Turn. 207; see *post*, *Robinson v. Tickell*, vol. viii. 142; *Hamley v. Gilbert*, 1 Jac. 354; [2 *Macpherson, Infants*, (Lond. ed. 1842,) 333.]

(c) See *Van Vechten v. Van Vechten*, 8 Paige, 105; *Smith v. Edrington*, 8 Cranch, 66; *Allen v. Harrison*, 3 Call. 289.

(a) A bequest of stock is not always specific. As a bequest of "twenty-five shares in the capital stock of the State Bank of North Carolina," the testator owning at the time that number of shares in the Bank, was held not specific. It would have been otherwise if the testator had said "my twenty-five shares," &c. *Davis v. Cain*, 1 Ired. Eq. 304; see *Smith v. Lampton*, 8 Dana, 69; *Cogdel v. Cogdel*, 3 Desaus. 373. See also as to what are specific and what general legacies, *Simmons v. Vallance*, 4 Bro. C. C. (Am. ed. 1844,) 345, 349, note (c); *Stafford v. Horton*, 1 ib. 483, note (a); *Peterborough v. Mortlock*, 1 ib. 567; *Ram on Assets*, ch. 3, p. 383-386; *Bradford v. Haynes*, 20 Maine, 105; *Boys v. Williams*, 2 Russ. & My. 689; *Attorney General v. Grote*, 2 Russ. & My. 699; *Walton v. Walton*, 7 Johns. Ch. 258; *White v. Winchester*, 6 Pick. 48; *Walker's Estate*, 3 Rawle, 237; *Jenkins v. Hanahan*, 1 Cheeves, Ch. 129; *Ashburner v. Macguire*, 2 Bro. C. C. (Am. ed. 1844,) 108, 114, note (i); *Coleman v. Coleman*, ante, 2 V. 639, note (a).

(c) *Walton v. Walton*, 7 Johns. Ch. 262; *White v. Winchester*, 6 Pick. 48; *Hayes*

quot part of his Stock, as if it was a movable chattel; and I must give effect to it, whatever consequence may follow in disappointing the will; unless you can show, that it is impossible he could mean it. I can put no other construction upon it than that the law has put; that it is specific (1).

Another very unfortunate consequence is, that, unless a specific ground is laid, I must make the general fund pay all the costs, except of the inquiries as to the specific legatee. It is very hard: but the rule is too well established, that the general personal estate not specifically disposed of is first to be applied to the costs, and then to the legacies; and the specific legatee is only to contribute as far as the costs occasioned by the inquiry as to his specific legacy (2).

Declare, that the legacy of 3000*l.* Stock to the Plaintiff and the bequest to Elizabeth Barton of the household goods, furniture, &c. are specific; and that the Defendant James Barton is entitled to the two several sums of 100*l.* each, given by the will for his board and education and as an apprentice fee. Tax all parties their costs; and let the Master ascertain, how much of such costs relates to the orders of reference and reports of a guardian and maintenance for the infant Plaintiff; and let the personal estate not specifically disposed of be applied in payment of the costs, exclusive of the costs relating to the guardian and maintenance for the Plaintiff; and afterwards in payment of the legacies; and the property of the testator being insufficient, declare, that the general legatees and annuitants ought to abate in proportion, &c.

The costs as to the guardian and maintenance of the Plaintiff were directed to be paid by sale of part of the Stock specifically bequeathed to him.

1. A LEGACY given to an infant "to place him out apprentice," must be paid (if no other period for payment be expressly appointed) in a year after the testator's death, like any other legacy; although the infant may not then be of a fit age to be placed out. *Nevill v. Nevill*, 2 Vern. 430. So, when a person has deposited the requisite sum of money for the purpose of procuring promotion for another in the army, and the money remains unapplied in the army-agent's hands at the death of the depositor, the deposit, it has been decided, may be considered to have been intended as an absolute bounty, though the ill health of the party whose

v. Hayes, 1 Keen, 97; *Kampf v. Jones*, 2 Keen, 756; *Stephenson v. Dousson*, 3 Bea. 342; 2 Williams, Executors, (2d Am. ed.) pt. 3, b. 3, ch. 2, § 3, p. 538; *Ib.* ch. 3, § 1, p. 946; *Ashburner v. Macguire*, 2 Bro. C. C. (Am. ed. 1844,) 114, note (i).

But it is otherwise if the fund be converted by statute or operation of law. *Brown v. Macguire*, 1 Beat, 358; *Walton v. Walton*, 7 Johns. Ch. 262. See also *Basan v. Brandon*, 8 Sim. 171, where the change had been made without the knowledge of the testator. See also 2 Williams, Executors, (2d Am. ed.) 946, 947, pt. 3, b. 3, ch. 3, § 1; *Greene v. Symonds*, 1 Bro. C. C. (Am. ed. 1844,) 129, in note; *Galbraith v. Winter*, 10 Ohio, 64; *Colleton v. Garth*, 6 Sim. 19; *Gardner v. Hatton*, 6 Sim. 93; *Colegrave v. Manley*, 6 Madd. 72; *Ashe v. Berry*, 1 Beat. 255.

(1) As to specific legacies, see, *ante*, *Raymond v. Brodbelt*, 199; *Kirby v. Potter*, vol. iv. 748, and the references in the notes, 750, ii. 641.

(2) *Nisbett v. Murray*, *ante*, 149; *Houssé v. Chapman*, vol. iv. 542; *Sayer v. Sayer*, Pre. Chan. 392.

promotion was a primary object disables him from continuing in the service; *Leche v. Lord Kilmorey*, Turn. 207; see, however, *Hamlay v. Gilbert*, Jacob's Rep. 358: and the case might be different, if a question arose, not upon a direct gift by testator himself, but upon a power to others to give; the object of creating which power seemed confined to answering some particular purpose: *Lewis v. Lewis*, 1 Cox, 163; *Robinson v. Cleator*, 15 Ves. 526; but where a gift of the dividends of trust stock proceeds directly from the testator, though he may have declared such gift was intended "for and towards the maintenance of all children of the legatee, until they should attain the age of 21;" at which time the principal was to be transferred to such children, and in default of such issue to go over; the legatee, though childless, will be entitled to the dividends. *Hammond v. Neave*, 1 Swanst. 38.

2. For some of the leading rules with respect to the construction of testamentary instruments, and the extent to which those general rules may admit qualification, see, *ante*, notes 4, 5, 6, to *Blake v. Bunbury*, 1 V. 194.

3. As to the distinction between general, specific, and demonstrative legacies, see the notes to *Coleman v. Coleman*, 2 V. 639; and that the general costs of executing a testator's will must come out of his general assets, see note 3 to *Misbett v. Murray*, 5 V. 149, and note 2 to *House v. Chapman*, 4 V. 542.

[* 465]

MILSOM v. AWDRY.

[ROLLS.—1800, JULY 5, 9.]

RESIDUARY bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid.

Upon the death of one without a child that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares: but upon the death of the last survivor without a child, his shares, both original and accrued, are undisposed of; notwithstanding another has left a child, [p. 465.]

ISAAC MOODY by his will, dated the 9th of June, 1787, after giving a legacy of 200*l.* to his wife, gave to Awdry and Humphreys all the residue of his money and securities for money, goods, chattels, rights, credits, estate, and effects, which he was anywise entitled to, whether in possession or expectancy, in trust to pay and apply the same in manner following: namely, that they should in the first place pay thereout all his just debts and funeral expenses; and afterwards that they should place and continue the same out at interest upon Government or real securities, and the interest and increase thereof should pay and apply to and among his (testator's) nephews and nieces, sons and daughters of his late brothers and sister, Matthew, David, and Hannah, equally between them share and share alike for their lives: the children of such of them, his said brothers and sister, to have only their father's or mother's share between them; and from and after the death of either of his said nephews and nieces in trust to call in the share of the principal money, out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as

should happen to die; and if any of his said nephews and nieces should die without leaving any child or children, then the share or shares of him, her, or them, so dying, should go to and among the survivors or survivor of them in manner aforesaid.

The testator died soon after the execution of his will. The bill was filed by the assignees under a commission of bankruptcy issued against a person, who in 1792 purchased all the interest of Samuel Ovens under the will. A decree was made directing the accounts; and an inquiry, what nephews and nieces of the testator were living at his death; whether any and which are dead; and whether they left any and what issue.

The Master's report stated the nephews and nieces of the testator and their issue. The testator's sister Hannah had married — Ovens; and had issue, Jacob, who died first without issue; John, who died next leaving issue Jane Short; Samuel Ovens, living unmarried; and Hannah Coe, dead without issue.

*The cause coming on for farther directions, the ques- [*466] tion was, whether the Plaintiffs were entitled to the absolute interest in the shares accruing to Samuel Ovens by survivorship, or to an interest for his life only in those shares.

Mr. *Lloyd* and Mr. *Romilly*, for the Plaintiffs. The interest in these surviving shares is absolute and transmissible. Strong words would be necessary to restrain it to an interest for life. This is the gift of a residue. Therefore the testator cannot be supposed to mean to leave any thing to be undisposed of.

Mr. *Piggott*, Mr. *Martin*, and Mr. *Horne*, for the Defendants. Samuel Ovens could take only an interest for life under the words "in manner aforesaid." Those words must be construed just as if the testator had repeated all the words he had used as to the original shares, applying them to the shares accruing by survivorship. They strike out these words; which will govern the whole of the preceding bequest. At least they must limit the interests accruing by survivorship; and as they cannot be claimed absolutely, the consequence, I admit, is, that there may be a partial intestacy.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. This is the case of a residue; therefore every intendment is to be made, that the testator meant to dispose out and out (1). I think the case so very doubtful, that I must consider farther. I have changed my opinion more than once.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is one of the most difficult questions, that can occur: the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity; and it is impossible to put any construction upon them, which will not under certain circumstances be contrary to the testator's intention (a).

(1) *Philips v. Chamberlaine*, *Booth v. Booth*, *ante*, vol. iv. 51, 407; *Bolger v. Mackell*, *post*, 509; 2 Mer. 386.

(a) If any word or expression has no intelligible meaning, or be absurd, or be

The question upon this will is raised with respect to the interest of the children of the testator's sister ; who had four children. The first, that died, was Jacob ; who died without issue. The question then is, in what manner his fourth was to go to the three survivors ; for John, who is since dead, did not die till afterwards.

[* 467] *The question is, whether upon the death of Jacob the accruing share went to the three survivors for their lives only, or absolutely. Since that John Ovens has died ; and he left issue : so that upon his own share there can be no doubt. Afterwards Hannah Coe died without issue ; and Samuel Ovens is now the only survivor ; in whose right the Plaintiffs insist, that upon the death of any one of the nephews or nieces the share of that one survived to the others, not for their lives only, but absolutely. On the other hand it is contended, that upon the death of any one that share went to the survivors in the same manner as the original shares did ; namely, for their lives only ; and I suppose it is admitted, that the share of each, both original and accruing, should likewise go to the issue, if any. It must have that effect. The only question in this cause then is, how the words "in manner aforesaid" are to be applied. I am bound to give those words the same construction. The true rule is to give every word a construction, if I can, without violating clear words in other parts of the will or the general intention (a). If the will, after the disposition, in case any of the nephews or nieces should die without leaving issue, to the survivors or survivor, had stopped there, it would have clearly passed the absolute interest : but I must see, whether I can refer the subsequent words to any preceding part of the will. If those words mean only, that it is to be divided equally between them, they have no effect whatsoever. I cannot help saying, though it is but a conjecture, that the testator meant them to take that surviving share under the same terms, and subject to the same restrictions and limitations as the original share. That is the fairest construction ; and that which I ought to put upon this will. I cannot say, I have not had doubts upon it ; nor, that my opinion has not varied.

The next consideration is, whether this violates the general intention, as manifested in this will (b) ; for that is the true way, in which we ought to construe such a will. See the effect of this. If I was to say, what the testator meant, there can be no doubt, that if there were any children, they would have the whole fund after the death of the tenants for life ; and I have endeavored to give this

repugnant to the clear intent shown in the rest of the will, it may be rejected. *Bartlett v. King*, 12 Mass. 537.

(a) *Daves v. Swan*, 4 Mass. 208 ; *Parsons v. Winslow*, 6 Mass. 169 ; 2 Williams, Executors, (2d Am. ed.) 793, 794 ; Ram on Wills, ch. 12, p. 98.

(b) The intention must be gathered from the whole will. *Sams v. Mathews*, 1 Desaus. 131 ; 2 Williams, Executors, (2d Am. ed.) 790, 791 ; Ram on Wills, ch. 11, § 1, p. 64, *et seq.*

And if the particular intent cannot be executed, the general intent will prevail. *Hawley v. Northampton*, 8 Mass. 3 ; *Cook v. Holmes*, 11 Mass. 528 ; Ram on Wills, ch. 13, p. 100.

will that effect: but I cannot go so far as to give the words "survivors or survivor" so large a construction. I think, there have been cases, in which those words have had a larger sense imputed to them than the words import; as upon a gift to child *dren, when they attain the age of twenty-one or marry; [* 468] and if any die before the age of twenty-one or marriage without leaving issue, then to the survivors or survivor: one attains the age of twenty-one; and dies: then another dies under twenty-one and unmarried; and the words "survivors or survivor" have been considered the same as "others or other:" so that such as attain twenty-one should have vested interests. But in this case, when the testator speaks thus, I am obliged to give it to the survivors or survivor. The conclusion is, they shall take it as nearly as possible as the original shares; namely, for their lives; and after the death of any of those survivors as well the original as the accruing share would go to the child of that survivor. They are now reduced to one. If he dies, without leaving a child, there must be an intestacy upon this construction; and yet there is issue of a deceased brother living. I wish extremely, that I could construe the words "survivors or survivor" to mean "others or other;" so as to make them tenants in common with cross remainders. In the case of estates tail I could have made that construction, to let in the issue of John; which would have been the most beneficial construction; and probably was the intention. I think, there is such a determination. But giving this absolutely would not solve the difficulty.

Declare, that upon the death of Jacob Ovens without issue one third part of his fourth of a third went to John for his life; one other third to Samuel for his life; and the remaining third to Hannah for her life; and upon the death of John leaving issue his original share, together with the third share, which devolved upon him for life upon the death of his brother Jacob, belonged to Jane Short, his only child; and upon the death of Hannah Coe without issue her share, together with the third, that accrued to her upon the death of Jacob, belonged to Samuel Ovens for his life; and in case he shall die, leaving issue, that issue will be entitled, as well to his original share, as to the shares, that survived to him; and in case of his death without issue they will belong to the next of kin of the testator as undisposed of.

July 11th. A few days afterwards the cause was mentioned again as to the costs; and the costs of Samuel Ovens were directed to be paid by the *Plaintiffs; and the costs of [* 469] the other party to be paid out of the fund in Court.

MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN]. I am very much inclined to give a larger interpretation to the words "survivors and survivor;" as Lord Thurlow was in *Ferguson v. Dunbar*; (1) and to hold, that if there should be children of any, there

(1) 3 Bro. C. C. 468, n.

would not be an intestacy: but I can go no farther; and am sorry for it. I cannot find the decree in *Ferguson v. Dunbar* in the Register's Book. There is only an adjournment of the cause; and the decree does not appear to have been entered.

1. THAT a Court will never be disposed to put such a construction upon a will as would lead to an intestacy, and that this will more especially be avoided when a residue of personalty is the subject of bequest, see, *ante*, note 2 to *Maberley v. Strobe*, 3 V. 450.

2. As to the consequences which frequently have arisen from attempting to combine a testator's general intent with his particular intent, see the notes to *Sims v. Doughty*, 5 V. 243, and note 6 to *Bristow v. Warde*, 2 V. 336.

3. A will may be so penned, that, not only what is originally given to a legatee, but also whatever interest accrues to him by the deaths of other legatees, shall be subject to survivorship; though the general rule seems to be otherwise, when the construction rests with the Court: see the notes to *Vandergucht v. Blake*, 2 V. 534. The conclusion which, in the principal case, Lord Alvanley felt himself compelled to come to, against the claims of the issue of one of the deceased legatees, is in accordance with the *Anonymous case* in App. to the second edit. of 2 Freem. 301: but it has been frequently decided, that the word "survivors" may be understood as meaning no more than "others," where the context does not forbid that construction; *Davidson v. Dallas*, 14 Ves. 578; and where that sense can be given to the word, the legatees who are to take after a particular interest given for life, may, although they should not survive the party to whom such life-interest is given, take interests therein, transmissible to their representatives. *Barlow v. Saller*, 17 Ves. 482; *Wilmot v. Wilmot*, 8 Ves. 12.

SNELL v. SILCOCK.

[1800, JULY 11.]

REMAINDER under an old settlement barred by a fine and non-claim: the fine also working a discontinuance. The Defendants producing the lease for a year and a copy of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment; and in default the bill to be dismissed with costs.

Remainder in a settlement, after successive estates tail in the sons, to the daughters as tenants in common and not as joint tenants, and in default of such issue, to the right heirs of the father, admitted without argument an estate for life only in the daughters, (a) [p. 470.]

THE Plaintiffs claimed under a settlement by lease and release, alleged by the will to have been executed, and to bear date, the 13th and 14th of December, 1734; by which it was witnessed, that John Morford in consideration of the love and affection he had for Mary, his then wife, and that she may be provided of a sufficient jointure, and for settling the premises and other causes and valuable considerations, conveyed several premises in the parish of Walcot and county of Somerset to Mary Wyatt, her heirs and assigns, upon

(a) See *Newton v. Griffith*, 1 Harr. & Gill 111; *Hickman v. Quinn*, 6 Yerger, 96; *Hawley v. Northampton*, 8 Mass. 3; *Wait v. Belding*, 24 Pick. 129, 133; *Cook v. Holmes*, 11 Mass. 528, 531; *Bowers v. Porter*, 4 Pick. 198.

the uses and trusts after mentioned : namely, to the use of John Morford for life without impeachment of waste ; remainder to the use of Mary Morford for life, in full of jointure ; and after their several deceases to the use of John, Morford, their only son and the heirs of his body lawfully begotten ; and for default of such issue to the use of the second, third, &c. and all and every other, son and sons of John Morford, the elder, on the body of his said wife, to be begotten, and the heirs of their respective bodies lawfully issuing ; and in default of such issue to the use of all and every the daughter and daughters of the body of John Morford, the elder, on his said wife to be begotten, as tenants in common, and not as joint tenants, and for and in default of such issue then to the right heirs of him, the said John Morford, for ever.

* John Morford and Mary his wife were married in [*470] 1724. They had six daughters, born after the date of the settlement : Mary Cottle ; Sarah Snell ; Rebecca Morford ; Hannah Silcock ; and ———.

In Easter Term, 1768, a fine was levied by John and Mary Morford and their son as to part of the premises ; and by indentures, dated the 16th of Februry, 1768, that fine was declared to enure as to part of the premises, called Paine's Leaze, to such uses as John Morford the elder and Mary his wife and John Morford the younger should jointly appoint by deed or writing ; and, for want of and until appointment, to the use of Morford the father for life without impeachment of waste ; after his decease to his wife for life in the same manner : and after their several deceases to the use of such persons as the son should appoint by will or deed ; and, in default of such appointment, to the use of the issue of the body of the son male or female and their heirs ; and in default of such issue to the use of Rebecca Morford, Hannah Silcock, and Elizabeth West, their heirs and assigns for ever ; and as to other parts of the premises to the use of the father, his heirs and assigns for ever.

Some parts of the premises were sold and exchanged by the father, mother and son, under the fine.

In 1768 Morford, the son, died intestate and without issue.

John Morford, the father, by his will, dated the 30th of May, 1773, gave all his freehold estates whatsoever and wheresoever, except an orchard, afterwards given to Mary Cottle, to his wife for life, if she so long continue his widow ; and after her decease he gave two fields to Rebecca Morford and Hannah Silcock, their heirs and assigns : in trust out of the rents and profits to pay to Sarah Snell for life an annuity of 20*l.* for her sole and separate use ; and he directed her and her husband to give a release and discharge to his executors of all claims and demands except the said annuity ; otherwise she and her child should receive no benefit from his will ; and after her decease, in case she and her husband gave such release, to pay 8*l.* per annum to maintaining and breeding up the youngest child living at her death ; and that the residue of the rents, till the child should attain the age of twenty-one, should be enjoyed by Han-

nah Silcock ; and, after the child should attain the age of twenty-one, out of the rents and profits of the two fields to pay 8*l.* a year to such child for life ; and after the death of that child he gave and devised the same to Hannah Silcock, her heirs and assigns for ever. The testator then, after disposing of his other real estate, not including Paine's Leaze, and of his personal property, principally among his other daughters, except Sarah Snell, and their issue, and charging some other premises with so much as the rents of the two fields should prove deficient to pay the annuity to Sarah Snell, made his wife and Rebecca Morford and Hannah Silcock executrixes.

The testator died in 1773. His widow entered ; and she died in February, 1778. Upon her death the Defendants entered. Mary Cottle died in 1785.

The bill, filed in 1788 by the testator's second daughter Sarah Snell and Charles Snell, her husband, against the other surviving daughters, their husbands and children, and other persons, claiming under the uses of the fine and the will, prayed, that a copy of the release of December, 1734, in the possession of the Defendants, may be brought into Court ; and that an issue may be directed to try, whether the settlement was executed : and that the Defendants may be restrained from setting up the fine and the deed to lead the uses ; and that, if the issue shall be found for the Plaintiff, Sarah Snell may be declared entitled to one sixth part of the premises from the death of her mother, except some parts, that had been sold, and of the fee-farm rents reserved upon the sales ; an account of the rents, &c. ; and if the Plaintiff's father duly disposed by his will, and had power to dispose, of the premises, then that the Plaintiff may be declared entitled to the annuity of 20*l.* according to the will ; submitting to execute a release.

The bill charged, that the settlement was concealed from the Plaintiff Sarah Snell by her mother and sisters ; that the original release was in the possession of the father and mother after the death of the son ; and that the father and mother and Rebecca Morford, Hannah Silcock, and Elizabeth West, executed a deed, dated the 5th December, 1769, conveying, that part of the premises, called Paine's Leaze, by which they covenanted to produce that settlement among other deeds, according to a schedule.

[* 472] The * Plaintiffs also charged, that, as the estates for life in succession to the father and mother were protected by the limitation to Mary Wyatt and her heirs to preserve contingent remainders, no right of entry accrued to the son or any other person upon the levying the fine.

The Defendants, Hannah Silcock and Rebecca Morford, claimed under the fine, and a conveyance from Mrs. West and her husband of her share, the fee-simple of the premises, called Paine's Leaze. The rest were claimed under the will. The Defendants produced the original lease for a year and a copy of the release of 1734. In answer to the charge, that the settlement was concealed from the

Plaintiff, they stated, that the Plaintiff Sarah Snell lived with her mother ; and they believe, if such settlement existed, the Plaintiffs were not strangers to it, as alleged, till lately ; and the Defendants were first informed, that such settlement had been executed, nine or ten years ago. They admitted, that the fine did not comprise the whole of the premises, which were the subject of the settlement.

The *Attorney General* [Sir John Mitford] and Mr. Martin, for the Plaintiffs first observed, that it might have been a question, whether the daughters took an estate for life or in tail ; no words of limitation being added : but they admitted, that after *Hay v. The Earl of Coventry* (1) they could not under this deed contend for more than an estate for life : at the same time remarking, that in *Owen v. Smith* (2) the Court laid hold of words applied by the settlement to the estates of the subsequent sons ; and held it an estate tail.

The existence of the settlement, under which the Plaintiffs claim, is not disputed by the answer. The lease for a year and the copy of the release are produced ; and in 1769 the Defendants covenanted to produce the deed. The claim of the Plaintiff against her sisters does not affect the annuity given by her father's will. The Defendants having notice of the settlement, having it actually in their custody, Equity will not permit a fine levied under such circumstances to operate to the Plaintiff's prejudice ; and will prevent the right from being barred. The father by his will has not made any disposition of that part of the premises comprised in the settlement, of which the fee-simple was limited to his three daughters.

* He does affect to dispose of that part, of which the fee was [* 473] limited to himself. In 1769, before the death of the father, the three daughters were in possession of this deed ; and they kept it after the deaths of their father and mother. It is not even now forthcoming. Under these circumstances a Court of Equity ought not to permit parties to take advantage of the possession of the deeds for the purpose of defeating the right of the Plaintiffs on the ground of non-claim under the fine. It is against conscience, that they should set up a bar on the ground of non-claim upon this fine ; which is produced by their having in their custody the instrument, that ought to have been produced upon the death of the father or mother. This is a very important consideration ; as tenant for life, with remainder to his issue, is intrusted with settlements of this description. As to the settlement being voluntary, such a settlement, where it is executed in performance of a moral duty, as to provide for a wife, has been supported against all persons except creditors at the time (3) : 2 Ves. 11, and *Stevens v. Olive* (4). The settlement of 1768 is also voluntary ; and the motive, instead of a moral duty, was to deprive some of the daughters of their provision. If the Plaintiffs are barred during the coverture, unquestionably Mrs. Snell, having

(1) 3 Term Rep. B. R. 83.

(2) 2 H. Black. 594.

(3) *Lush v. Wilkinson*, ante, 384.

(4) 2 Bro. C. C. 90.

been a married woman during the whole time, will not be barred, in case she survives her husband.

The point of election (1) in respect of the annuity given to the Plaintiff by the will cannot affect her right to the premises called Paine's Leaze.

The *Solicitor General*, [Sir *William Grant*] and Mr. *Mansfield*, for the Defendants. The object of this bill is to set up a voluntary settlement of as old a date as 1734; and the bill was filed in 1788, ten years after the right accrued. Undoubtedly a voluntary settlement is as good as any other, except against creditors; but that does not lead to the conclusion, that a Court of Equity will lend its aid. If they have the settlement, they may make use of it, except against creditors: but a Court of Equity will not interfere to aid it to this extent, or to remove incumbrances. If they can prove the [* 474] loss of the deed, * and show the copy, and give sufficient evidence of the contents, they may proceed at law. The jurisdiction is the same (2). I admit, considerable evidence of the existence of the deed appears in this cause; the lease, the copy of the release, and the schedule. That deed might have been destroyed by the maker, considering it as voluntary, and intending to make another disposition. There is no authority for setting up a voluntary deed, that has been put an end to by the author. In *Naldred v. Gilham* (3) that was much discussed; and Lord Macclesfield decided, against the opinion of the Master of the Rolls, that such deed could not be set up again; and gave costs; because a copy had been obtained in a fraudulent manner. What equity is there under a voluntary settlement against the author of it, having it in his own power, who chooses to destroy it and prevent its operation? But as they have now got the copy, this is no longer a case for equity. The copy is evidence at law; and they want nothing more in equity. Such remedy as they have at law they may pursue; though there is no doubt, the legal, as well as the equitable, remedy is gone. The fine was probably levied by mistake. The intention must have been to put an end to the settlement of 1734. If they had joined in suffering a recovery, it would have done; and now the fine with non-claim will do. It seems admitted, that there is a complete bar against Mr. Snell.

The alleged suppression of the deed is not made out. The covenant and schedule prove no such thing. The deed could not be in possession of the Defendants in 1769; for, when the fine was levied, the daughters were not in possession of the estate; and could have had no right to the custody of the deed. It was necessary for the daughters to join in the conveyance: but that is no evidence of

(1) See the cases upon election referred to, *ante*, vol. iv. 627, in the note to *Ward v. Baugh*; *ante*, *Long v. Long*, 445; *Wollen v. Tanner*, 218; *Wilson v. Lord J. Townshend*, *ante*, vol. ii. 693, and the notes, i. 523, 7.

(2) *Read v. Brookman*, 3 Term Rep. 151; and see Mr. Fonblanque's note, 1 Treat. Eq. 2d edit. 16.

(3) 1 P. Wms. 577.

their possession. But the deed must of necessity have been in the possession of the father, and have continued in his or the mother's possession for ten years afterwards. There must be fraudulent concealment. During the time the non-claim was running the Defendants had no knowledge of the existence of this deed; for they swear, they discovered it since. Then how is their conscience affected; and why are they to be prevented from setting up this bar? *What inquiries can avail the Plaintiffs? [*475] They have got the discovery; and know as much of this deed as we can tell them; that the lease and a copy of the release are existing. They produce all they find; and it is not probable, that any thing more can be got by the examination of these parties. If they had destroyed the deed, they would also have destroyed the copy and the lease. The Plaintiff Mr. Snell actually residing with her mother was much more likely than her sisters to know of that deed. They were sufficiently apprised of it to have enforced it, if they thought proper; and yet ten years elapse, before even this suit is instituted. What was done in 1768 was equivalent to an actual conveyance and sale of the estate. The father, mother, son and daughters, acquire by that deed interests, which they otherwise could not have had. The estates might have been sold or exchanged; and exchanging interests, taking new interests, having parted with those they had, is exactly the same as taking other lands. There is no ground to infer imposition, advantage taken, or ignorance.

As to the question of election, without doubt it extends to Paine's Lease as well as the rest. The clause, that the Plaintiff shall release all claims and demands, must extend to the estates conveyed by the deed and fine.

LORD CHANCELLOR [LOUGHBOROUGH]. Have you considered a little, whether, supposing, there was no bar from time by the fine, the mere operation of the fine, would not have totally destroyed this estate; and whether the daughters, supposing the father to have died within a year afterwards, could have had a right of entry? Would it not have been a discontinuance by all these three parties joining in the fine?

For the Defendants. Certainly it was a discontinuance. The only legal remedy could have been by *formedon*, not by ejectment.

The *Attorney General*, [Sir John Mitford], in reply. Part of the premises comprised in the settlement was not included in the fine. The Plaintiffs have no means of asserting their right but by a bill in Equity; the deeds being in the possession of the Defendants.

LORD CHANCELLOR [LOUGHBOROUGH]. As to all, that is comprised in the fine, they are barred. As to what is not [*476] comprised in the fine they may proceed as they please.

The decree directed, that the bill should be retained; with liberty to bring an ejectment as to the premises not comprised in the fine: such deeds as either side shall give notice of, particularly the lease for a year and the copy of the release, to be produced; and

the Defendant not to set up the Statute of Limitations as to any time, that may have run subsequent to the filing of the bill; and without prejudice to any claim the Plaintiffs may have to the annuity of 20*l.* given to the Plaintiff Sarah Snell by the will of her father upon the condition therein mentioned: in default of bringing such action the bill to be dismissed with costs.

SEE, *ante*, note 1 to *Toulmin v. Price*, 5 V. 235, that a bill filed in Equity may prevent the running of a fine.

THOMPSON v. LAWLEY.

[1800, JULY 11.]

GENERAL devise of all manors, messuages, lands, tenements, and hereditaments, in the county of York or elsewhere, with long limitations in strict settlement; and a residuary disposition of the personal estate also by very general words. The Lord Chancellor was clearly of opinion, that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case, [p. 476.]

BEILBY THOMPSON, being seised and possessed of very large real estates and personal property, by his will, dated the 28th of May, 1794, after directing his debts, funeral expenses, and legacies, and particularly legacies of 2000*l.* to each of his nephews and nieces, sons and daughters of Sir Robert Lawley deceased, to be paid in manner therein mentioned, and confirming the settlement made upon his marriage; whereby his manor of Wheldrake in the county of York and certain tenements and hereditaments within the parish of Wheldrake were conveyed to secure a jointure of 800*l.* a year to his wife, devised the said manor, and all and singular the said tenements, and all and singular hereditaments mentioned, and all other his manors, messuages, lands, tenements and hereditaments, to trustees, their heirs and assigns, to the uses, upon and for the trusts, intents, and purposes, therein named: that is to say; as to his manor of Wheldrake, to the intent, that his wife should receive thereout during her life the yearly sum of 200*l.* in addition to the yearly sum of 800*l.* under the settlement; and subject to some other annuities, as for and concerning the said manors, messuages, and other hereditaments, so charged with the said annuities, with all their rights, members, and appurtenances, and as for and concerning all [*477] other his manors, messuages, lands, *tenements, and hereditaments, with all their rights, members, and appurtenances, in the said county of York, or elsewhere in the kingdom of Great Britain, to the use of the first son of his body, and the heirs male of the body of such first son; remainder to the second and every other son successively in the same manner; remainder to the first and other sons in tail general; remainder to all and every the

daughter and daughters of his body as tenants in common in tail, with cross remainders ; remainder to his brother Richard Thompson and his assigns during the term of his natural life without impeachment of waste ; remainder to his first and other sons in tail male ; remainder to trustees for 1000 years ; remainder as to all and singular the said manor, messuages, and other hereditaments, charged with the said annuities and term, and as to all other his manors, messuages, lands, tenements, and hereditaments, with their respective rights, members, and appurtenances, except his manor of Bole and all his messuages and other hereditaments in the parish of Bole, with their rights members and appurtenances, to the use of Paul Beilby Lawley, third son of Sir Robert Lawley, and his first and other sons in tail male ; with similar limitations in strict settlement to the second son of Sir Robert Lawley, and his first and other sons, and then to the eldest son, &c. ; and for want of such issue to the use of his own right heirs.

The testator then, after a provision, that the third and second sons of Sir Robert Lawley should take the name and arms of Thompson, and provisions for making a jointure and raising portions, devised the manor of Bole, and all his messuages, lands, tenements, and hereditaments, within the said parish ; and bequeathed certain parts of his personal estate ; and declared the trust of the term for raising 20,000*l.* for his three nieces, the daughters of Sir Robert Lawley. Then reciting, that it was his intention to have given his wife the choice of any one of his mansion-houses in Yorkshire or London, or the house he lately purchased at Putney, but she having declined the acceptance of either of them, and, inasmuch as she would have no house of her own to go into after his decease, therefore he gave her the sum of 5000*l.* ; whereof he directed 2000*l.* to be paid within three weeks after his decease, and 3000*l.* within three months after his decease ; and in case his death should happen at either of his houses in Yorkshire *or in [* 478] London, or at his house at Putney, he gave his wife the liberty of residing in such house for one month, and to continue the housekeeping : but, if he should not die in either of his own houses above-mentioned, he gave her the same option of either of them. Then, after specific legacies to his wife and others and legacies to his servants, he gave and bequeathed all his moneys, securities for money, goods, chattels, and effects, and all other his personal estate, not herein before by him disposed of, or to be disposed of by any codicil, to his brother Richard Thompson and his sister Jane Lawley in equal shares and proportions ; and he appointed them executor and executrix.

The testator died on the 10th of June 1799 without issue ; leaving his brother, his heir at law, and his sister, nephews and nieces, also surviving him. He was possessed of two leasehold houses ; one at Putney, the other in Mortimer-Street Cavendish-Square, for the remainder of the respective terms of fifty and sixty years.

The bill was filed by Richard Thompson ; praying, that the two

leasehold houses and other leasehold premises may be declared to constitute part of the personal estate and belong to the residuary legatees.

The defendants insisted, that the leasehold estates passed under the general devise of all his manors, messuages, lands, &c.

Mr. *Mansfield* and Mr. *Stratford*, for the Plaintiff; and Mr. *Raynsford*, for the Defendant Jane Lawley. There can be no doubt, that the general disposition of the testator's estates by this will applies only to what is ordinarily understood by real estate. He uses the general word "messuages" coupled with "manors, lands, tenements and hereditaments;" creating a great number of limitations; one for a term of 1000 years; and he makes a very general disposition of his personal estate. The case of *Rose v. Bartlet* (1) was followed by *Davis v. Gibbs* (2), *Knotsford v. Gardiner* (3); and was particularly acknowledged and reasoned upon in *Chapman v. Hart* (4). *Pistol v. Riccardson* (5).

[* 479] * The Lord CHANCELLOR, [LOUGHBOROUGH], called upon the Counsel for the Defendants; observing, that he did not see, what the words were, that could raise the doubt.

The *Attorney General*, [Sir John Mitford], for the infant Defendants, Devises in remainder. Mr. Cox observes upon *Pistol v. Riccardson*, that *Addis v. Clement* (6) was not once adverted to in the consideration of that case. In *Turner v. Husler* (7) the leasehold tithes were held to pass by the general words; and Baron Eyre showed some disapprobation of *Rose v. Bartlet*; which has thrown some doubt upon the point. In *Lane v. Lord Stanhope* (8) upon a case sent to the Court of King's Bench upon words very similar to these that Court held, the leasehold estate did pass. The testator takes notice of these houses in his will. It is clear therefore, they were in his contemplation. Perhaps the best course will be to direct a case, as in *Lane v. Lord Stanhope*.

LORD CHANCELLOR [LOUGHBOROUGH]. I have no doubt upon this case. I am perfectly satisfied, this testator had no idea of including these two houses in Marybone and at Putney in the intail of an estate of 10,000*l.* a year. If he had died intestate as to his personal property, it could not have been conceived, that these houses passed by the will. It is not clear, he thought of these houses, when giving his personal property; and it is very clear, he had them not in contemplation, when disposing of his real estate. I think the determination in *Addis v. Clement* right. That arose upon a church

(1) Cro. Car. 293.

(2) 3 P. Wms. 26.

(3) 2 Atk. 450.

(4) 1 Ves. 271.

(5) Stated 2 P. Wms. 459, in Mr. Cox's note to *Addis v. Clement*. See *Doe v. Williams*, 1 H. Black. 25; post, *Hartley v. Hurle*, 540; *Watkins v. Lea*, vol. vi. 633; ante *Sheffield v. Lord Mulgrave*, ii. 526; *Woodhouse v. Meredith*, 1 Mer. 450; *Hodson v. Merest*, 9 Pri. 556.

(6) 2 P. Wms. 456.

(7) 1 Bro. C. C. 78.

(8) 6 Term Rep. B. R. 315.

lease. The lease was by habit and custom renewable. Lord King strained the words a little; being perfectly satisfied, the testator meant it. But here all the description is of real estate. I think, in fact all these cases applied to church leases. I have no difficulty in directing a sale: but if you think the houses will sell better by having the opinion of a Court of law upon it, I have no objection.

A case was accordingly directed; and the Lord Chancellor desired, that the following facts should be stated; that the testator was seised of estates of considerable value in the county of York and elsewhere; that he had purchased the house in Mortimer Street for a term of years; and likewise purchased the leasehold estate at Putney; and that he had two houses upon his settled estate (1).

SEE, *post*, the note to *Watkins v. Lea*, 6 V. 633.

YATE v. MOSELEY.

[* 480]

[1800, JULY 10, 12.]

BILL against the devisee and personal representatives, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the Plaintiff; who eighteen years ago had compromised a suit instituted by him upon the subject; (a) in consequence of which the right to compel an election, depending on a doubtful question on the will, was not ascertained; and the party having possessed under the will during her life had disposed of her estate real and personal by will.

DR. SPROTT by his will, dated the 24th of October, 1753, after confirming his marriage settlement, devised freehold and copyhold estates in the counties of Salop and Stafford and the city of Litchfield, and all his freehold and copyhold estates whatsoever, subject to the settlement, to trustees and their heirs, to the following uses and trusts: as to all his freehold and copyhold estates (except some, which he gave to his nephew Thomas Yate in fee) upon trust to permit his said nephew to receive the residue of the rents and profits, after payment of life annuities, until the testator's heir or devisee thereof should attain the age of twenty-one, in case Thomas Yate should so long live; and, in case of his decease before that time, to permit Elizabeth Sprott, afterwards Toldervy, her child and

(1) Upon argument of this case in the Court of Common Pleas it was decided, that the leasehold houses did not pass under the devise of the real estate. 2 Bos. & Pull. 303.

(a) As to compromises, see *post*, 485, note (a).

In reference to the general disinclination of Courts of Equity to aid stale demands, see *Jones v. Tuberville*, 4 Bro. C. C. (Am. ed. 1844,) 115; *Andrew v. Wrigley*, ib. 138; *Deloraine v. Brown*, 3 ib. 633, 645, 646, and notes; *Benzein v. Lenoir*, 1 Car. Law, Repos. 508; *Breckenridge v. Churchill*, 3 J. J. Marsh. 15; *Frame v. Kenny*, 2 A. K. Marsh. 146; *Coleman v. Leyne*, 4 Rand. 454; *Shaver v. Radley*, 4 Johns. Ch. 316; *Core v. Smith*, 4 Johns. Ch. 271; *Phillips v. Belden*, 2 Edw. 1; *Prescott v. Hubbell*, 1 Hill. Ch. 213.

children, to receive such rents and profits, until such heir or devisee should attain such age of twenty-one years aforesaid; and in case there should not be such child or children of his said niece, which should or might live, or she should not live, till such heir or devisee should attain twenty-one, in trust, that the trustees should receive such rents and profits for the use and benefit of such person, who should take as devisee of his freehold and copyhold estates.

The testator then devised and bequeathed all such his freehold and copyhold estates to the use of the first and every other son and sons of the body of his niece Dorothy Ashwood in tail male; and for want of such issue, to trustees to preserve contingent remainders; remainder to the use and behoof of the first and every other son and sons of Elizabeth Sprott successively in tail male; and in default of such issue to the use of the said Thomas Yate for life; remainder to his first and other sons in tail male; remainder to the use of the testator's nephew Henry Yate and his sons in the same manner; remainder to the testator's right heirs.

The testator died upon the 24th of November, 1760, without issue; leaving Ann, wife of James Moseley, Dorothy Ashwood, and Elizabeth Sprott, the three daughters of his eldest brother, his co-heiresses at law. Thomas Yate entered upon the freehold estates in the county of Salop; and received the rents and profits [* 481] till his death * in December 1772. Mary Sprott, the testator's widow, entered upon the freehold and copyhold estates in Staffordshire and Litchfield; and received the rents and profits till her death in January 1772. After their deaths William Toldervy and Elizabeth, his wife, entered upon the freehold estates in the county of Salop and in Litchfield, and the copyhold estates. Mrs. Toldervy being entitled to the fee-simple of one third part of the freehold estates in Staffordshire under deeds, dated the 10th of August, 1754, and the 5th of March, 1761, and a fine, in which she and her two sisters joined in 1774, also entered upon one third part of those freehold estates; and Moseley and his wife and Dorothy Ashwood entered upon the other two thirds. William Toldervy continued in possession till his death, and then Elizabeth Toldervy till her death without issue in February 1797. By her will, dated the 4th of September, 1794, she devised her third part of the freehold estates in Staffordshire to Walter Henry Moseley; and disposed of her personal estate. Samuel Yate, the only son and heir at law of Thomas Yate, since the death of Mrs Toldervy, Mrs. Ashwood being also dead without issue, entered under the will of Dr. Sprott, and was in possession of all the estates, except the freehold estates in Staffordshire.

The bill was filed by Samuel Yate against Walter Henry Moseley and the personal representatives of Mrs. Toldervy; charging, that the said fine and deed to lead the uses could not impeach the Plaintiff's title to the said one third of the freehold estates in Staffordshire; as Elizabeth Toldervy had no power to make any devise whatsoever of the said third part; for, as the claims of Elizabeth

Toldervy under the testator's will and under the said deeds are distinct, she was compellable to elect; and having continued in possession and receipt of the rents of all the testator's estate, which she claimed under his will, during her life, she elected to take under the will: as, if she had elected to take under the deeds she could only have taken possession of the said third of the Staffordshire freehold estate; and therefore upon her decease the Plaintiff became entitled, not only to the said freehold Shropshire and Litchfield estates and the said Staffordshire copyhold estates possessed by her, but also to the said one third of the said freehold estates in Staffordshire possessed by her.

The Plaintiff therefore insisted, that he is entitled to the said one third of the premises last mentioned, or to a satisfaction out of the assets of Elizabeth Toldervy.

* The prayer of the bill was, that the Defendant Moseley [*482] may set forth, what claim he has upon the last mentioned premises; and that the Plaintiff may be declared entitled under the will to one third of the freehold estates in Staffordshire, and for a conveyance and an account of the rents and profits; and if the Court should be of opinion, that the Defendants are entitled under the will of Elizabeth Toldervy, then the Plaintiff claimed a satisfaction out of her assets.

The answer stated, that the Plaintiff by his next friend in 1773 filed a bill against Elizabeth Toldervy and her husband, and other persons; seeking among other things to put them to their election to take under the will of Dr. Sprott, or against it. They put in their answer in 1773; and in 1782, after the Plaintiff had attained twenty-one, the bill was dismissed upon his own petition, by consent without costs. The Defendant submitted, whether the Plaintiff is now entitled to the said third of the freehold estates in the county of Stafford; and insisted, that, if it can now be inquired into, whether Elizabeth Toldervy made any election respecting the Staffordshire estates, she elected to take against the will; as appears by her having with James and Ann Moseley and Dorothy Ashwood delivered declarations in ejectment, and entered into possession of one third, and having levied a fine, and charged the premises with an annuity, and done other acts of absolute ownership.

Mr. Mansfield, Mr. Richards, and Mr. Benyon, for the Plaintiff. There can be no doubt, this was a case of election. Mrs. Toldervy having had possession of both estates, and having insisted on her right to both, it cannot now be said, she elected to take the Staffordshire estate contrary to the will. The transaction with respect to the ejectment, that was brought, shows, the rights of the parties could not have been then understood. The bill also was not upon the ground of election: nor does any thing of election appear in the answer: but the Defendants insisted on their claim to both estates. That suit never applied to this question. Abandoning the bill does not give up the right. As to the length of time, a Court of Equity never calls on a person to assert a right, unless, if asserted, benefit

would arise from it. That could not be till the death of Mrs. Toldervy without issue. Till then the right was contingent. Mrs. Toldervy having taken all the benefit under the will, she must be bound, as having elected to take under the will; and cannot now elect to take against it.

[*483] The *Attorney General*, [Sir John Mitford], *Solicitor General*, [Sir William Grant], Mr. Alexander, and Mr. Thomson, for the Defendants. This is a new case. It is too much to come after the death of the party to bind the property, and to say, she has in fact made an election. The claim of the Plaintiff is a mere Equity; either, that he may have that part of the estate, alleged to be devised, and which really belonged to Mrs. Toldervy, or, that she shall abandon all claim under the will. Against that there is an Equity infinitely stronger; for Mrs. Toldervy must have died under the idea, that she had a power to dispose of the property, as she has done, and to consider it not subject to any demand of this sort. This question arose, and was put in issue, in the former cause; and under that bill a case was sent to the Court of King's Bench: but it was never argued. Nothing could be more fully and explicitly in issue than the question of election in that cause. An injunction was prayed upon that very ground. The bill was dismissed by consent; and there must have been some compensation to the Plaintiff. That bill was dismissed in 1782; and the Plaintiff suffers Mr. and Mrs. Toldervy to consider and treat this property as their own. Upon her death this bill was filed. Is it then conscientious to charge her personal estate, and take it from the residuary legatee? Suppose, her personal estate was insufficient for her debts: is this claim to disappoint other creditors? This Court, in many instances, where there has been an enjoyment permitted, has refused an account of the rents previous to the filing of the bill (1). The Court would not go farther, even if Mrs. Toldervy was living; the Plaintiff alleging, that he was mistaken; and therefore had a right to make her elect now. It is infinitely stronger, as she is dead; and has by her will disposed of her personal estate one way, and of her real another. This claim might defeat, not only her legatees, but even her creditors. There is no Equity therefore for the Plaintiff, that is not answered by a superior Equity for the Defendants. His conduct was equivalent to a release.

Lord CHANCELLOR [LOUGHBOROUGH]. Upon the question of election this is exactly the case upon **The Duke of Montague's* will (2). Lord Northington's judgment, that the Duke had elected to take according to the will of his father, turned upon the distinct act of taking probate of his father's will; the strongest act, that he possibly could have done, importing an election to take under the will. Upon that ground Lord Northington held, that he had elected: but the House of Lords held otherwise

(1) *Acherley v. Roe*, post, 565.

(2) *Lord Beaulieu v. Lord Cardigan*, Amb. 533.

Mr. *Mansfield* in reply observed, that there was no express condition in this case, as in that, requiring Mrs. Toldervy to do any act to complete her title under the will ; and again insisted, that the former suit did not apply to this question ; and asked, what compensation the Plaintiff had.

LORD CHANCELLOR [LOUGHBOROUGH]. It seems to me, that the course the Court is bound to take in this cause is as clear as possibly can be. All the matter now in issue between the Plaintiff and the representative of Mrs. Toldervy was the subject of dispute twenty-eight years ago. All the points, that could be raised, the very right the Plaintiff now asserts, were asserted in that bill. Answers were put in ; and issue taken upon it. Eighteen years ago an end was put to that suit by the act of the Plaintiff. The suit itself was a family cause ; and he distinctly states, that in consequence of a compromise he dismissed his own bill by the consent of the other parties, without costs. It is now asked, what was that compromise. If the bill had been filed against Mrs. Toldervy, she could have told me : but it is filed against her representatives. How do the representatives know, what passed, what was transacted and done between the parties, eighteen years ago ?

It is unnecessary to go farther into the cause ; but when I consider, what was that cause, I must be of opinion, that nothing was done in the progress of that cause in 1782, by which Mrs. Toldervy could have been called upon at that time to declare an election. Did she take any thing by the will ? If the construction is one way, she did, if the other way, she did not. It was an extremely doubtful question : whether that devise of the intermediate rents and profits would attach in Mrs. Toldervy. The object of the will was a son of the elder sister Mrs. Ashwood. The expression of the will as to the intermediate rents and profits is, " my heir or devisee " in the singular number. The question upon that was, * whether the disposition of the [* 485] intermediate rents and profits respected one heir or the whole line. That question must have been decided in favor of Mrs. Toldervy, before she could have been called upon to elect ; for, if that was the construction, which her sisters contended to be the construction, then she had nothing to take under the will ; but the intermediate rents and profits would have resulted to the heirs at law ; who were herself as to one third and her sisters as to the other two thirds. It was necessary therefore, before she could elect, to have her right ascertained by a suit to decide that question. No such suit was prosecuted. This Plaintiff admits, there was a compromise ; and now against his own act he brings forward this question. It was his business sooner for the peace and tranquillity of all the family either to have brought it forward in an adverse way, or to have had it settled in an amicable manner. It is against all the prudence and convenience, which regulate the proceedings of the Court, to permit him now to agitate it (a).

(a) Courts will not investigate the merits or demerits of the claims of the different parties for the purpose of setting aside a compromise of doubtful or con-

Upon the conduct of the Plaintiff, I think, I am bound to dismiss the bill, and to dismiss it with costs (1).

THAT Courts of Equity are never disposed to aid stale demands, where the party complaining has long slumbered on his rights, see, *ante*, the notes to *Jones v. Turberville*, 2 V. 11; and that the compromise of a doubtful question will not be annulled, merely because it was prejudicial to one of the parties, if the transaction was free from all taint of fraud, see note 4 to *Gibbons v. Count*, 4 V. 846. With respect to the general doctrine of election, and the right which a party has to have all the circumstances affecting both the interests ascertained, before he can be compelled to elect between them, see the note to *Butricke v. Broadhurst*, 1 V. 171, note 3 to *Blake v. Bunbury*, 1 V. 194, note 8 to *Bristolow v. Warde*, 2 V. 336, and note 7 to *Thellusson v. Woodford*, 4 V. 227.

BEAUMONT v. BOULTBEE.

[1800, JULY 15.]

ACCOUNTS opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. (a)

The character of the Defendant, as agent, accompanying him in his situation, as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the Plaintiff in not bringing forward the demand at an earlier period, (b) [p. 486.]

Relief, not specifically prayed, within the general relief, (c) [p. 495.]

SIR George Beaumont, Bart. having in 1757 employed Joseph Boulton the elder to receive his rents and manage his estates in the county of Leicester at a salary of 20*l.* a-year, in 1760 granted him a lease of a colliery and a fire-engine within the manors, &c., of Coleorton, Thringston, Worthington and Newbold, part of the said

flicting rights fairly entered into. *Mill v. Lee*, 6 Monro, 97; *Moore v. Fitzwater*, 2 Rand, 442; *Bennett v. Paine*, 5 Watts, 259; *Mosely v. Leeds*, 3 Call, 439; *Taylor v. Patrick*, 1 Bibb, 168; *S. P. Union Bank v. Gray*, 5 Peters. 168; 1 Story, Eq. Jur. § 131.

Family compromises are upheld by Courts of Chancery with a strong hand. 1 Story, Eq. Jur. § 132, notes and cases cited.

(1) As to election see the references, *ante*, vol. iv. 627, in the note to *Ward v. Baugh*; *ante*, *Long v. Long*, 445; *Wollen v. Tanner*, 218; *Wilson v. Lord J. Townshend*, *ante*, vol. ii. 693; *Blount v. Bestland*, *post*, 515, and the notes, *ante*, vol. i. 523, 527; [*Blake v. Bunbury*, 4 Bro. C. C. (Am. ed. 1844), 28, and note (c).]

(a) Courts of Equity will open and examine accounts after any length of time in respect of fraud. *Botifour v. Weyman*, 1 M'Cord, Ch. 161; *Farnam v. Brooks*, 9 Pick. 212; *Gray v. Washington*, Cook, 321; *Revett v. Harvey*, 1 Sim. & Stu. 502; *Barrow v. Rhineland*, 1 Johns. Ch. 550; *Baker v. Biddle*, 1 Bald. 394, 418; *Bainbridge v. Wilcocks*, *ib.* 536, 540; *Middleditch v. Sharland*, *ante*, 87, and notes; Story, Eq. Pl. § 801; Cooper, Eq. Pl. 279; Beames, Pl. Eq. 225, 226, 228.

(b) Story, Eq. Pl. § 801.

(c) If the plaintiff should mistake the relief, to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right, under the prayer for general relief, provided it is such relief as is agreeable to the case made by the bill. *Wilkinson v. Beal*, 4 Madd. 408; *English v. Forrell*, 2 Peters, 595; Story, Eq. Pl. § 40; *Colton v. Ross*, 2 Paige, 396; 1 Barbour, Ch. Pr. 37.

estates, for twenty-one years ; reserving the yearly rent of 140*l.* ; with a covenant on the part of the lessee, that he would not get more than 10,000 loads of coal from the said colliery in any one year during the term. It was agreed at the same time, that the actual rent to be paid should be 200*l.* a-year ; and the lessee accordingly executed a bond for the payment of 60*l.* a-year in addition to the reserved rent of 140*l.*

* By a memorandum in writing, executed by Sir George [*486] Beaumont on the 13th of March, 1761, it was declared, that notwithstanding the covenant in the lease, the lessee, his executors, &c., might get more than 10,000 loads of coal in any one year, so as the quantity should not exceed 10,000 loads one year with another during the term, and they should not take more than 20,000 loads in the two last years of the term.

About the same time that the lease of the colliery was granted Sir George Beaumont also granted to Boulton a lease of a farm, part of the same estate, for twenty-one years at the yearly rent of 305*l.* He also rented some cottages, and the Spring Wood in Coleorton Wood ; paying to Sir George Beaumont for the former 30*l.* a-year, for the latter 15*l.* a-year.

Sir George Beaumont died in 1762 ; leaving a son, Sir George Howland Beaumont, Bart. then aged six years, his heir at law, and tenant in tail under a settlement of the Leicestershire estate. Boulton continued in the management of the estate ; and he and his son worked the colliery till the expiration of the term in August 1781 ; when the father applied for a new lease : but Sir George H. Beaumont being abroad, and Thomas Bridge, his principal agent, declining to enter into any agreement for that purpose, Boulton in 1782 or 1783 without authority removed the engine, and erected an engine in Coleorton Field at some distance from the former work, and began to work that colliery, and continued to work the old one.

Sir George H. Beaumont returned to England in 1784 ; and being informed of the application refused to grant a new lease.

In May 1784 Boulton, the son, on behalf of his father delivered to Bridge a proposal, containing the terms, on which he was willing to work the colliery. That proposal stated, that Boulton had paid in cash and materials for erecting a new fire-engine and planting a new colliery in Coleorton Field 1317*l.* 13*s.* ; that he is debtor to Sir George Beaumont for materials taken from the old engine 412*l.* 1*s.* ; and that bills yet unpaid for altering a stable into a dwelling-house and erecting a new stabling would come to 100*l.* These sums, amounting in the whole to 1829*l.* 14*s.*, it was proposed, in case Sir George Beaumont should not choose to *grant a [*487] lease for twenty-one years, should be secured to Boulton in something like the following manner : if he holds the colliery but three years, Sir George Beaumont to reimburse him the whole 1829*l.* 14*s.* in consideration of the trouble he has been at in planting the work : if Sir George Beaumont shall at any future time before the expiration of twenty-one years take the colliery into hand,

or set it to any body else, then Boulton after the expiration of the first three years to abate 70*l.* per annum out of the 1829*l.* 14*s.* for every year he shall hold it: if he holds it the twenty-one years, Sir George Beaumont then to pay for the materials only by appraisement: Boulton agrees to pay for every load of coals one twelfth of the money they shall be sold for as far as 6000, and one eighth for every load above 6000 loads in one year, and 50*l.* per annum for the lower field work at Newbold, so long as that can be carried on to advantage.

This proposal was altered by Bridge by substituting 5000 loads instead of 6000, as the quantity, upon which Boulton should pay a twelfth only of the produce instead of an eighth. He stated, that Sir George Beaumont considered the proposal so altered as proper; except, that the reduction of 70*l.* a year for the use of the engine should take place from the commencement of the term, instead of the end of the first three years. This being opposed by Boulton, and insisted on by Sir George Beaumont, produced some correspondence. No lease however was executed: but the Boultons continued to work both the colliery newly opened in Coleorton Field, and the old colliery at Newbold, which they represented as nearly exhausted; charging themselves according to the proposal with a rent of only 50*l.* a year for the latter, and for the new colliery with a mine-rent of 1*s.* a load generally, and sometimes 1*s.* 6*d.*

Boulton the father also after the expiration of the lease of the farm continued in possession thereof and also of the cottages and Spring wood; paying the same rent as he had paid to Sir George Beaumont. In 1790 Boulton the father died; having made his will, and appointed his son executor; who succeeded him in the management of Sir George H. Beaumont's estate; and continued to work the old colliery, till it was exhausted in 1792, and the new one till September, 1797, when Sir George H. Beaumont discharged him from being his steward, and turned him out of possession of the colliery, farm, and other premises.

[*488] *In 1798 the bill was filed by Sir George H. Beaumont against Boulton, the son; praying an account of the value of the coals got by the Defendant's father under the lease of the 1st of August, 1760, more than 10,000 loads in each year: also that the Defendant may come to an account with the Plaintiff for all transactions between the Defendant's father, the Defendant, and the Plaintiff, from 1781; or if the Court shall be of opinion, that the account ought not to be carried back so far, and that the accounts passed by Thomas Bridge on behalf of the Plaintiff from that time ought to be considered as settled accounts, that the Plaintiff may be at liberty to surcharge and falsify; &c.: the Plaintiff offering to make an allowance to the Defendant for the value of the fire-engine at the time he quitted possession of the colliery in Coleorton Field upon being allowed a fair rent upon the produce of the said colliery for the time aforesaid according to the ordinary rate, at which collieries under similar circumstances have been let.

The bill stated, that the lease had been obtained at an under-value through the misrepresentation of Boulton; and charged, that Bridge from a confidence in the Defendant and his father did not investigate their accounts, or require any vouchers; that the accounts passed by him contained many false charges, errors, and omissions; that the old colliery at Newbold was of much greater yearly value than 50*l.*; that no agreement was entered into according to the proposal; that the Defendant and his father did not charge themselves with a mine-rent agreeably to the proposal, namely, with a twelfth part of the produce; that a much greater quantity of coal was got, and sold at much higher prices than appear by the accounts; that they had fallen timber and made bricks, which they applied to their own use, without account as to the latter; and as to the former accounting only at the rate of 1*s.* per foot; claiming the right to fall timber in Coleorton Wood, proper to be fallen, and to take it at that rate, and the top, lop, and bark, as a farther compensation for their trouble as stewards: the bill stating as to that, that the salary was increased in 1792 to 50*l.* a year, on condition that the Defendant should not fall timber or take any benefit from the timber fallen.

The Defendant by his answer admitted, that in many years of the term his father got from the colliery a much larger quantity than *10,000 loads, paying only the rent of 200*l.* a [*489] year: but he stated, that the circumstance was fully known and explained to the Plaintiff so long ago as 1779; and he and Bridge acquiesced in the reasons given by the Defendant's father. He farther stated, that soon after the commencement of the lease an estate, called Rotten Row, and the manor of Thringston, adjoining the Plaintiff's estate, was held forth to sale. That estate was supposed to contain valuable mines of coal; which might at a future time be worked in competition with the Plaintiff's colliery. The price demanded was 2000*l.*; though it produced a rent of no more than 10*l.* a-year. The Defendant's father proposed, that it should be purchased for the Plaintiff's benefit: but that proposal being refused, the Defendant's father in 1764 purchased it for his own use for 1600*l.* In 1766 the Defendant's father purchased from Edward Dawson, whose lands adjoined the Plaintiff's colliery, and were intermixed with his lands, the liberty of getting the nether coal under his land, for 200*l.*; and in 1772 he made a similar purchase from John Cotton at the rate of 30*l.* an acre, amounting to 213*l.* 7*s.* 6*d.*; those lands being also adjoining the Plaintiff's colliery, and intermixed with the Plaintiff's land. He stated, that his father was under the necessity of purchasing the coals under Dawson's and Cotton's lands, as without it the coal on the Plaintiff's estate could not continue to be got to the best advantage; and in consequence of those purchases he got from the lands of Dawson and Cotton large quantities of coals; which were stacked upon the Plaintiff's land, and mixed with the coal from his colliery; and the Defendant and his father could not distinguish, how much of the coal was got from the

Plaintiff's land, and how much from the lands of Dawson and Cotton; and down to the expiration of the lease his father got in the whole, including the coal got from the lands of Dawson and Cotton, 282,188 loads, being 42,188 loads more than at the rate of 10,000 loads a-year.

The explanation, alluded to by the answer, as to the excess of the coal got beyond the quantity stipulated, passed in the course of a correspondence between the Defendant's father and Bridge in 1779 and 1780. Bridge desiring an account of that excess, Boulton, the elder, sent him an account of the quantity of coal got by him, and also the amount of the extra expenses he had been at in [* 490] the said purchases and in building a new fire-engine; * with interest upon those disbursements. Bridge in reply asking, what he thinks may be reasonable to pay for the coals got above what were allowed by the lease, and desiring an explanation as to the other articles, Boulton by a letter, dated the 18th of December, 1780, gives the following answer to his inquiries:

"I put down the quantity of coals got in the three years before the commencement of my lease, that you might know, how many loads had been got in the whole, since I entered upon the work; I must confess, that as I found the work in the most deplorable state, and had great trouble and expense in bringing it into tolerable working condition, I was in hopes, that the 6200, which those three years produced less than 30,000, might be deducted from the quantity I had got more than stipulated by lease: but if that appears to you unreasonable, I shall say no more about it. The most reasonable and regular mode of payment would undoubtedly be an additional year's rent of 150*l.* for every 10,000 loads, which exceeds my quantity: but out of that money we must indisputably deduct the 413*l.* 7*s.* 6*d.* paid to Dawson and Cotton for their coal; because while that was getting, Sir George's was not. The reason, why I take the value of the new engine is this: seventeen years ago (owing to the rottenness of Sir George's engine pit-shaft, which at that time ran in and drowned the work) I was obliged to erect a new one at the expense of 1500*l.*; the interest of which since that time amounts to a very considerable sum, beside the decrease in its value, whenever it comes to be disposed of. The year after this, namely, sixteen years ago, I gave Mr. Busby 1600*l.* for the Rotten Row and manor of Thringston; which undoubtedly ought to have been Sir George's purchase, and not mine; as his deep coal adjoining to it can never be got to advantage without it. From this purchase I have received no more than about 10*l.* per annum. These circumstances and expenses, when duly weighed and considered by you, I make no doubt, will appear amply sufficient of themselves, exclusive of the 413*l.* as above, to balance the profit of 48,000 loads of coals. I shall be happy to hear as soon as convenient, that my arguments appear to you conclusive."

He then expresses his wish, that his whole conduct in Sir George Beaumont's affairs should appear upright and honest.

The answer insisted, that as no claim was afterwards made in respect of the excess of coal got beyond the stipulated quantity, there is no pretence for the Plaintiff's now setting up any demand in respect of the said coals, or in any manner touching the said lease.

The Defendant admitted that considerable quantities of coal had been got from the old colliery at Newbold, since the expiration of the lease; alleging, that it had turned out better than was expected. He admitted, that that colliery was in 1790 assessed to the land-tax and poor's rate as of the yearly value of 220*l.*; and that his appeal from that rate was dismissed. The Defendant also admitted having cut timber and made bricks. He insisted upon the terms contained in the proposals, as having been acceded to, with the alterations proposed by Bridge; though no agreement was actually executed.

The cause having been argued at great length by the *Attorney General* [Sir John Mitford] and Mr. Romilly, for the Plaintiff, and Mr. Mansfield and Mr. Hart, for the Defendant, stood a short time for judgment. The Plaintiff consented to take the rent of the Newbold colliery at 220*l.* a year.

July 15*th*. Lord CHANCELLOR [LOUGHBOROUGH]. There is no doubt as to the decree in this cause; except as to the claim set up by the Plaintiff to an account of the quantity of coal got beyond the 10,000 loads in each year, the quantity stipulated by the lease: the lease to the Defendant at 50*l.* a year is so apparently under the actual value; when it was his duty fairly to represent the case at least: he represented it so low, that it was hardly worth any thing; representing it to be a worked-out colliery, and as a favor to Sir George Beaumont. He ran no risk. He was not bound to be at any expense. The fair value of the coal to be got ought to have been the measure of it. The Plaintiff seems to be contented to take it at 220*l.* a year. Therefore it is unnecessary to enter into the circumstances of the Defendant's conduct in that instance; which certainly affords matter of gross and very particular charge against him. As to the other matters, they are trifling. Mr. Boulton was certainly very undeserving the confidence, which the Defendant states was always placed in him and his father. He must account for the wood and for the bricks made.

The material question is as to the excess of coal got [*492] beyond the stipulated quantity. The defence as to that rests upon the length of time and the neglect of the Plaintiff in not making the demand at an earlier period. With regard to the neglect, in many cases that will have considerable effect: (a) but I do not know a possible case, in which a confidential agent and steward can impute neglect to his employer; for it is his duty to render an account, and a fair account, to his principal, and distinctly to apprise him of the whole right he has. It is not for him to say, that person has been guilty of neglect, whose negligence it was his duty to guard

(a) See the cases cited in note (b) to *Hercy v. Dinwoody*, 4 Bro. C. C. (Am. ed. 1844,) 260.

against with regard to his transactions with all persons, but particularly with regard to himself. As to the colliery, of which Boulton, as steward, obtained a lease, it is obvious, Sir George Beaumont was not instructed, as he ought to have been by any person acquainted with the subject, as to the nature of that engagement, which the owner of a colliery enters into with the tenant. The allowance to be made for over-getting the coal cannot with any justice to the landlord be postponed to the end of the lease. It is very fair, that the deficiency of one year should be compensated by the excess of another: but nothing can be more detrimental to the landlord than to postpone that settlement to the end of the lease; which Boulton has contrived with regard to his employer, as landlord, and himself, as tenant. Another circumstance was omitted; which never is omitted to be provided for in an engagement for the management of a colliery: viz. an engagement not to communicate the level of that colliery to a neighboring colliery. That he has done with regard to two neighboring coal owners. That act was in itself contrary to his duty, as steward. Suppose, he had been only superintendent to the Plaintiff, he would have taken care not to communicate the level to the neighboring coal owners. Every person, acquainted with the subject at all, knows, how very valuable an object the communication of the level is. That neighboring coal, which cannot be got without the level, lies there; and the owner of the coal, in which the level is, has always the advantage of taking that coal at much less value than any other person could get it.

At the close of the lease Mr. Bridge writes, with apparently great ignorance of the subject, from the style of the letter that appears, stating, that he was informed, Boulton had got more coal than he was entitled to, and carelessly desiring an account of what [* 493] he had *got more than he was entitled to. The answer contains no information. It was only calculated to draw more inquiry from Bridge; and to sound a little, whether Bridge knew any thing of the subject: on the other side are three or four articles, explaining nothing, stating nothing, demanding nothing. From that exhibition it was impossible for Bridge to be possessed in any degree of that species of information he had desired, in order that he might advise the Plaintiff as to the settlement of that account and the future management of the coal, and putting it in some train under a new lease. Consequently Bridge desires an explanation; and the explanation Boulton gives is very singular indeed. The terms of this letter are as dexterously contrived, as it is possible for a very ingenious man, in order to be answerable for nothing, to have an opportunity of advancing or retreating upon any of the hints he had given, and upon the whole exceedingly to alarm Bridge as to the consequences of coming to a strict and rigid settlement of accounts. A more extravagant and absurd demand could not be suggested than that made by Boulton upon the first question. As to the next question he makes a very modest proposal of an additional year's rent of 150*l.* for every 10,000 loads of coal exceeding

the quantity stipulated: a proposal ridiculous and absurd to any person at all acquainted with the subject. But Bridge was perfectly ignorant of the subject; and it did not strike him, as it must every other person, that an additional rent upon every 10,000 loads of coal was altogether absurd. He then proceeds to claim a deduction of the money paid to Dawson and Cotton for their coal; assigning the reason, "because while that was getting, Sir George's was not." Instead of deducting, money ought to have been paid to the Plaintiff for Dawson's and Cotton's coal being got by his level.

Then as to the new engine: was that sort of demand ever made; because he, without any bargain made, erected a new engine, decreasing in value; he having had the benefit of it? With regard to that demand, which he states as to the purchase of the Rotten Row and manor of Thringston for 1600*l.*, it is fair to state, that that sum of 1600*l.* should go in compensation of a considerable part of the demand, if not to the whole extent: but it is only upon the ground of the Plaintiff having had the benefit of it that it can be set off against his demand for the coal. The conclusion that Bridge seems to have drawn, is, that it would be a bad account for the *Plaintiff to demand. Upon a calculation it was clear, [* 494] that if all the counter demands were allowed, the balance of the account would be against the Plaintiff: but that is only upon the supposition of his having acted for the benefit of the Plaintiff; acquiring rights, that would be a benefit to the Plaintiff, and little to him. As to the 1600*l.* laid out in the purchase, Boulton receiving only 10*l.* a-year, it was handsomely done. The length of time weighs less here than in any case. The account can be taken now as well as at any time. The question is not merely between landlord and tenant, but between persons, in one of whom, as the answer states, the most implicit confidence was placed by the other, to receive the whole rents of this estate; and at the same time letting him a lease of part of it; which lease he has no right to defend, as the answer states it, as any other person may defend it. He cannot divest himself of the character of steward. Every other tenant is under the control of the steward: but his duty as steward accompanies him in his situation as tenant, and in the bargain he makes in that character. I should be very sorry to deny, that the gross abuse of that unlimited confidence, placed in the Defendant and his father, would afford a sufficient ground in this case: but I have no occasion to carry it so high, and not to give him the benefit of the length of time, from his conduct; for upon his letter he admits the Plaintiff's right; he admits the coal he got; and states as a compensation the benefit of the purchase. He has a right to set off that purchase against the demand: but he has continued to possess the purchased estate. Upon the foundation of that letter there is a demand: the Defendant holding the estate; and his letter implying a direct offer. The account was not prosecuted; and the matter

rests. Till that matter is liquidated, till these affairs are arranged, the business between the Plaintiff and the Defendant is not closed.

Direct an account of the quantity of coal got beyond the 10,000 loads in every year of the lease, and the value of that coal; and upon the other hand an account of all those claims made in the letter, dated the 18th of December, 1780, as a deduction from what may be coming due on the account of the overplus quantity of coal got: an account of the rents of the Newbold colliery since; charging the same by consent of the Plaintiff at 220*l.* a-year; and an account of the timber and bricks.

[* 495] * The Lord CHANCELLOR [LOUGHBOROUGH] was proceeding to declare the Defendant a trustee for the Plaintiff as to the purchase of the Rotten Row and the manor of Thringston at the sum of 1600*l.*; and in answer to the objection, that it was not prayed by the bill, said, it was within the general relief (1); and that the Plaintiff was bound to take it: for no dissent was expressed from the letter of 1781; in which the Defendant desires to set off that against so much of the demand, and if Bridge had pressed him, he would have said, he meant to give the Plaintiff the benefit of the purchase: but his Lordship added, that he would leave him to his election either to take it or not (a); and declared, that the Defendant conveying the estate purchased for 1600*l.* has a right to set off that against so much of the demand; with the like direction as to the purchases from Dawson and Cotton (2).

1. As to the duties which the relation of steward imposes, see, *ante*, the notes to *Lord Hardwicke v. Vernon*, 4 V. 411.

2. It has been held, in modern cases, that an agent may make a purchase, or take a lease, from his principal; if the latter, being fully informed upon the subject, and laboring under no improper influence or deception, is willing to accept the agent as his tenant, or allow him to become the purchaser: transactions of this kind will, however, undergo a strict and jealous investigation in Equity. *Morse v. Royal*, 12 Ves. 373; *Gibson v. Jeyes*, 6 Ves. 277; *Wren v. Kirton*, 8 Ves. 502; *Ex parte James*, 8 Ves. 345; *Lord Selsey v. Rhodes*, 2 Sim. & Stu. 50; *Lady Ormond v. Hutchinson*, 16 Ves. 107; *Harris v. Freemanheere*, 15 Ves. 39. A steward may, no doubt, as well as a trustee, divest himself of his confidential character, and thus qualify himself to deal with his former employer; but a purchase by him, even after the connexion has been dissolved, will be vitiated by his concealment of any information acquired by him whilst the relation lasted, and which it was his duty to have communicated to his employer. See note 1 to *Whichcote v. Lawrence*, 3 V. 740.

3. With respect to the latitude which a Court of Equity has of giving relief under the general prayer of a bill, beyond the relief specifically prayed, see note

(1) *Palk v. Lord Clinton*, *post*, vol. xii. 48, see 64.

(a) See *Fox v. Mackreth*, 2 Bro. C. C. (Am. ed. 1844,) 400, note (1), and cases cited; 425, note (c), and cases cited; 1 Story, Eq. Jur. § 322; *Dovoue v. Fanning*, 2 Johns. Ch. 252; *Van Horn v. Fonda*, 5 Johns. Ch. 388; *Grider v. Payne*, 9 Dana, 190; *Saltmarsh v. Beene*, 4 Porter, 283; *Prevost v. Gratz*, 1 Peters, C. C. 368. See also, *Whichcote v. Lawrence*, *ante*, 3 V. 740, and cases cited; 4 Kent, (5th ed.) 438, and cases cited.

(2) This decree was affirmed upon a rehearing as to part by Lord Eldon, C. *post*, vol. iii. 599; *Lord Hardwicke v. Vernon*, *ante*, vol. iv. 411; see the note, 418.

5 to *Weymouth v. Boyer*, 1 V. 416; and as to the time for which accounts may be carried back, see note 4 to *Pettitward v. Pressott*, post, (7 V. 541,) and the farther references there given.

BROWN v. HIGGS.

[ROLLS.—1800, JULY 7, 18.—ANTE, VOL. IV. 708.]

THE decree affirmed on a rehearing. (a)

General residuary clause in a will passes what is not well disposed of, (b) [p. 501.]

THIS cause (reported ante, Vol. IV. 708) came on to be re-heard, upon the petition of the Defendants Higgs and his wife.

Mr. *Stratford* and Mr. *Fonblanque*, for the Defendants. First, these Defendants are aggrieved by this decree; as no declaration is made as to the Lower Swell estate: Secondly, as the Brize Norton estate is declared well bequeathed in trust for all the children of Samuel Brown and William Augustus Brown.

As to the first point, the bill does not pray any declaration as to the Lower Swell estate: but it is very desirable, that the opinion of the Court should be pronounced as to that. By suspending the question the Court suspends, and may probably disappoint, the right of the husband; to whom, if the decree is made in her favor, it will belong, subject to her equity.

Upon the other point, the disposition of the Lower Swell estate goes to explain the other. There is a manifest confidence in the nephew John Brown as to the former. All are not intended to take: but the choice depends upon his discretion. It is impossible therefore to say, that any one, much less, that all, could take * without his appointment. How can this doctrine be rec- [* 496] onciled with the intention to give that estate to one? How can the Court in execution of the trust devolving on it, do that, which the trustee could not have done? The discretion as to the other estate is considerably enlarged: but still there is a discretion, to be executed personally. These words seem to have been understood by the Court, as if "or" was to be construed "and." It is not material to these Defendants, whether that construction can be made, or not: if it can, the same power of selection must apply also to the children of William Augustus Brown as to the children of Samuel. The question is, whether there is a gift to either class

(a) See the notes to this case, ante, 4 V. 708.

(b) See upon this subject 4 Kent, (5th ed.) 541-543, and notes. There is a distinction taken in this respect in the English books between a lapsed legacy of personal estate and a lapsed devise of real estate. See Ib. for the distinction and the reasons of it. See also *Woolmer's estate*, 3 Whart. 477; *Doe v. Edlin*, 1 Adol. & Ellis, 582; *Young v. Robinson*, 11 Gill & John. 328; *Jones v. Mitchell*, 1 Sim. & Stu. 290; *Gore v. Stevens*, 1 Dana, 207; *James v. James*, 4 Paige, 115; *Warner v. Swearingen*, 6 Dana, 195; *Van Kleeck v. Ref. Dutch Church*, 6 Paige, 600; *Green v. Dennis*, 6 Conn. 291; *Hayden v. Sloughton*, 5 Pick. 528.

of children, so that they can take any benefit, but in the manner expressly directed; namely, by the choice of John Brown. That question is distinctly determined in *The Duke of Marlborough v. Lord Godolphin* (1). Lord Hardwicke's words are (2), "Here is no gift to the children of the testatrix, otherwise than as they might take by execution of the power by her; and consequently the legacy is a mere gift to her for life, with power to dispose," &c. That case was infinitely stronger: the testator was making a provision for children; and an attempt was made to execute the power: yet Lord Hardwicke would not aid that defective execution. In this case there has been no attempt to execute the power. The true distinction is, that, if there is a gift to the children, and the power is only as to the proportions, the children shall take, though there has been no appointment; but this is no gift to the children: it is simply a gift to one, with a power to give to another; and there is a residuary legatee. Where the gift is through a power, and the power is not executed, it is as if there was no such power. How can the power devolve on the Court? The person to execute it is expressly pointed out; and that negatives an execution by any other authority. The testator might have reasons for trusting this person. He might be apprised of all the testator's partiality. The fallacy is in treating that as a trust, which is manifestly intended as a power. Mr. Powell (3) states the distinction between a non-execution and a defective execution; that Equity will never interfere to supply the former; because it would be repugnant to the nature of a power. It is true, as was said by the present Solicitor General in his reply in this cause, the Court will never permit a trust to fail by the [* 497] non-execution or death of * the trustee: but that, though true as to the trust, does not apply to a power; where the act to be done is not a mere apportionment of quantity, but a selection of objects; which the Court will not take upon itself; because the Court cannot get at the grounds, by which the discretion was to be regulated. These children were intended to have just what John Brown should say; and the Court is called upon to say, the testator has given to these children: but though the Court will aid a power, it will not create a devise.

In the case of the particular execution of a power failing by death, or accident, as idiocy, &c. the Court has taken upon itself the execution: so, as to charities: but the reason is, that charity is the object; which was the ground of *Moggridge v. Thackwell* (4), and those cases were upon the former argument admitted to stand upon their own ground. In *Mason v. Limbrey* (5) the word "desire"

(1) 2 Ves. 61; see that case stated from the Register's Book in the judgment, *post*.

(2) 2 Ves. 75.

(3) Powell on Powers, 157.

(4) *Ante*, vol. i. 464; 3 Bro. C. C. 517; *post*, vol. vii. 36. See *The Attorney General v. Andrew*, *The Attorney General v. Bouwyer*, *ante*, vol. iii. 633, 714; *Corbyn v. French*, iv. 418.

(5) Cited 2 Ves. 67.

amounted to a distinct gift ; which was also the ground of *Harding v. Glynn* (1); and if not, that case must be considered as overruled in *The Duke of Marlborough v. Lord Godolphin*. In *Witts v. Boddington* (2) there was a clear legacy by inference from the limitation over, if there should be no grand-children. It happened also that the grand-children were the next of kin ; and there was no residuary bequest.

Mr. *Stanley* and Mr. *Bell*, in support of the Decree. The question as to the Lower Swell estate does not now arise. That cannot be ripe for decision till the death of Mrs. Higgs: but her husband may preserve his right by assigning it immediately to a trustee.

With respect to the other part of the case, the construction, that has been put upon it by the decree, is the most rational, and the nearest to the intention, that can be supposed. Though a power of selection is given to John Brown, the interest of the children does not depend entirely upon the selection to be made by him. All the children of Samuel Brown and William Augustus Brown were in the testator's contemplation. The fair construction is, that John Brown was in fact made a trustee ; and had something more than a *mere power of nomination and selection ; [* 498] and then there are many authorities for the proposition, that the trust shall not fail by the death of the trustee. *Doyley v. The Attorney General* (3) is a very strong case to that effect. The interposition of the Court on that ground is said to be confined to charities : but though it has been exercised more frequently in those cases, yet it is general : and in *Moggridge v. Thackwell* the argument was upon the general principle ; that in all cases of the death of the trustee the power devolves upon the Court. Suppose, there was only one child ; in that case John Brown could have no discretion. The distinction between a trust and a power in this respect is not just. In *Alexander v. Alexander* (4) Sir Thomas Clarke does not take that distinction ; but speaks (5) of powers devolving upon the Court, where by accident, as, the death of persons, they cannot be exercised by those persons. Wherever there is a clear intention, that certain people shall take, and the mode only is left to the party, that is a trust. It does not depend upon the use of a particular word. This Court looks to the substance ; according to what Lord Hardwicke says (6) in *Godolphin v. Godolphin*. Some of the cases, which were considered in *Bull v. Vardy* (7), have had the word "desire": but they do not turn upon the particular word, if the intention appears, that certain objects shall take, and those ob-

(1) 1 Atk. 469. See that case stated from the Register's Book in the judgment, *post*, 501, and from Mr. Joddrell's note, vol. viii. 571. *Wright v. Atkins*, xix. 299.

(2) 3 Bro. C. C. 95 ; stated from the Register's Book in the judgment, *post*.

(3) 1 Vin. 485.

(4) 2 Ves. 640.

(5) 2 Ves. 643.

(6) 1 Ves. 23.

(7) *Ante*, vol. i. 270. See also *Makim v. Keighley*, ii. 333, 529, and the cases collected in Mr. Sanders's notes to *Harding v. Glynn*, 1 Atk. 469, and *ante*, vol. i. 272.

jects are pointed out. Another circumstance, upon which there can be no doubt, that this is a trust, is, that there is no disposition over. *The Duke of Marlborough v. Lord Godolphin* is plainly distinguishable. In this case the person, who was to execute the power, died; and never did appoint; and thereby it is become absolutely impossible to exercise it: in that an actual appointment was made by way of will; and two of the legatees died in the life of the testatrix; and the question was, not, what would have been the result, if she had died without attempting to execute the power, but, whether those two shares lapsed; as to which the attempt to execute the power failed by accident. Another distinction is, that was a power coupled with an interest. The object of the power was to secure their obedience to Lady Sunderland, not merely for the benefit of the children. The distinction is exactly that pointed out by Sir Thomas Clarke in *Alexander v. Alexander*. In *Maddison v. Andrew* (1) the cases, in which powers have devolved on [* 499] the Court, are mentioned; the non-acting, * misbehavior, or death, of trustees. The distinction between the failure of a trust by the death of the person to execute it, and the case, where that person has attempted to execute, but the performance fails by the death of the object, is clear and well founded; and is recognized in the two cases last mentioned.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. As to the Lower Swell estate, what right have I to give an opinion upon that? It is a legal estate. It is not in a trustee. I am not called upon to make a trustee convey. An ejectment may be brought.

Mr. *Stratford*, in reply. Certainly as to that estate an ejectment might be brought. No declaration of any right as to that is called for.

With respect to the other estate, the great difference is as to what may be supposed a trust, and what, a power. *Harding v. Glyn*, if not distinguishable both from this case and *The Duke of Marlborough v. Lord Godolphin*, must be considered as over-ruled by that case. It may be distinguished upon the word "desire;" which according to many determinations amounts to a gift. *Doyley v. The Attorney General*, so far as it did not relate to the charity, as to which it is out of the question, went upon the same ground as *Harding v. Glyn*. It was an execution of a gift in shares and proportions, in the mode prescribed by the testator. In *Witts v. Bodington* there was a gift to the grand-children by implication. The circumstance of a defective execution attempted in *The Duke of Marlborough v. Lord Godolphin* makes the stronger in favor of this Defendant. If the Court will not aid that, they will not interfere, where there has been no attempt to execute the power. The case, that has been put, supposing, there had been only one child, is plausible: but that is not the case; and even in that case, if John Brown

(1) 1 Ves. 57.

had died without expressing any disapprobation of that one, his consent might be implied from his silence. If it were material, it might be contended, that the gift to the children of William Augustus Brown is to take place only, if there should be no appointment to the children of Samuel. The testator has intrusted John Brown to say, which of the children of Samuel should take: then who can say, which shall take, and in what proportions? Can the * word "such" be construed "all?" Are not some [* 500] necessarily excluded?

July 18th. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am extremely glad this cause has been reheard; for it has afforded me the opportunity of looking very narrowly into the case of *The Duke of Marlborough v. Lord Godolphin*. The principal case has been very well argued; and I have had the opportunity of giving myself every information upon a point, certainly of no little difficulty and doubt: but notwithstanding the arguments, which for a time shook my opinion, upon full consideration I think, the decree ought not to be altered.

I have looked into the case I mentioned; and if my decree was contradictory to that, I should have paused, before I should have held, such a decree ought to stand against the authority of Lord Hardwicke, in a cause, upon which his Lordship must have taken very considerable pains, from the great magnitude of the property; and I am very glad to find, I can affirm my decree without infringing upon the authority of that decision. If it would have that effect, I should not set up my own opinion against that of so great a man, (a) in a cause of that nature, and which must have undergone so much consideration by him.

It is to be observed upon the circumstances of this case, that the whole interest the testator had in the Brize Norton estate is given to John Brown upon certain trusts; and after those trusts are performed he authorizes and empowers him to dispose of the surplus rent in this manner. Upon this disposition and the facts, that have taken place, the question is, whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown a power if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is any thing more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him in trust for those children at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his non-exercise of that power, or the circumstance of his being incapable of *exercising [* 501] it, will not prevent the objects of the testator's bounty

(a) See notice of him, *ante*, 1 V. 16, note (a).

from taking in some manner ; though the power of distribution on account of the death of the trustee cannot now be exercised. (a)

There is no doubt as to the question between the residuary legatee and the next of kin. No petition of rehearing has been presented by the next of kin ; and most unquestionably, if this interest is not well given by the will, it passes by the residuary disposition. (1)

As to the point, which is the subject of the rehearing, the Counsel have very properly endeavored to prove, this was not a trust, but a power. If that is so, their argument must prevail ; for I freely admit, the power has not been exercised ; and it is such a power as, I agree, the Court cannot exercise : and if it has not been exercised by the party, it does not devolve upon the Court. The question therefore is, whether there is any thing, from which an intention appears, that the children of Samuel Brown and William Augustus Brown were the objects, to whom the testator meant to give this interest, with a power only in John Brown to select or apportion, if he saw any reason to give a preference.

The two cases, most relied on upon both sides, are *Harding v. Glyn*, in support of the decree, and *The Duke of Marlborough v. Lord Godolphin* against it ; as affording a proof, that words of this sort are to be construed as powers, and not as trusts. I have taken some time to look into those cases, and *Witts v. Boddington* ; in order to be quite sure, that the real state of those cases agrees with the reports ; and I have extracted the small differences, that do appear in the Register's Book, as contrasted with the printed reports. First, as to *Harding v. Glyn*. It is not reported by itself in Vesey, but is mentioned in the argument of *The Duke of Marlborough v. Lord Godolphin*. This case is reported in Atkyns, but extremely short ; and the statement pretty nearly agrees with the other book. But I will state it from the Register's Book (2).

The testator gives to his wife all his estate, leases, and interest, in his house at Hatton Garden, and all the goods, &c. ; but did desire her at or before her death to give such lease, &c. unto [* 502] and amongst * such of his own relations as she should think most deserving and approve of. The bill states that the wife made her will ; and thereby bequeathed to the Plaintiff Elizabeth Stacy 500*l.* to the Plaintiff Harding Stacy 500*l.* ; and then proceeded thus : "*Item*, I give and bequeath to Henry Swindell of Tongeson all my estate, right, title and interest of and in all my messuage in Hatton Garden ;" and which said messuage is the house, which her husband bequeathed in manner aforesaid ; and the testatrix gave to Caleb Harding all her plate and 500*l.* ; and after giving several legacies gave the residue to Rokeby and Claget ; and made them executors ; and soon after died, without having given at or before her death the goods in the house in Hatton Garden, or without having disposed of any of her husband's jewels to his relations ;

(a) See *post*, 504, note (a).

(1) See the note, *ante*, vol. iv. 716.

(2) Register's Book, 1738, A.

though the Plaintiffs charged, that the said testatrix Elizabeth Harding not having any property in the said furniture and jewels, but only for life, and a limited power of disposing of the same to her husband's relations, which she has not done, therefore they ought to be distributed among his relations according to the Statute of Distributions of Intestates' estates (1). The decree declares, that the Defendant Henry Swindell the son is entitled to the leasehold house in Hatton Garden devised to him by the will of the said Elizabeth Harding pursuant to the power given her by the will of her husband. But it does not appear to me, that this person, to whom that house was given, was one of the next of kin of the testator. The decree then proceeds to declare, that so much of the household goods in Hatton Garden and other personal estate of the said Nicholas Harding, devised by his will, which she did not dispose of according to the power given her thereby, in case the same remain in specie, or the value thereof, ought to go to the next of kin of the testator, and be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding; and that the devise of the plate to Caleb Harding pursuant to the power given by her husband's will is a good devise.

The Court seems to have held that under the word "relations" she might, if she thought fit, include persons, not next of kin; but as to so much as she had not disposed of, it would go to such persons as were next of kin according to the Statute of Distributions.

The Counsel for the Defendants were so conscious of * this case pressing, as it certainly does upon all principles, [* 503] upon the determination of the present case, that they contended, that if that case does bear upon the present, it was overruled by *The Duke of Marlborough v. Lord Godolphin*; and indeed if that case was contradictory to it, that might have been argued. But I do not find any opinion of Lord Hardwicke tending to show, he disapproved of the former case. *Harding v. Glyn* appears to differ in no other respect, but that in that case there are words of request and desire; for the power was as extensive. There is as great power of selection. It does not fix upon any particular persons; and it could go only to such as the person having the power should think deserving and approve of; and but for the words of desire and request there is no difference between this case and that. The Court could not have exercised for the testatrix in that case that power of approbation and selection.

Another case, much relied upon in favor of his trust, was *Witts v. Boddington*. The Report of that case is very short. It is very material to state that case accurately; for when it is considered, it can hardly be said to bear upon this question; for there was a decisive intention, that at all events, if there were grand-children, they should take. The case is this (2). Lee Steere by his will gave to

(1) 22 & 23 Char. II. c. 10; 29 Char. II. c. 3.

(2) Register's Book, 1789, 660.

his wife the use and enjoyment during her life of all his watches, jewels, &c. with power for her by will or otherwise to give and bequeath the same unto and amongst some one or more of the child or children of his said daughter Martha in such manner and proportions as she his said wife shall think proper: but in case no such children of his said daughter should be alive at the time of his wife's decease, then he desired or directed her to give or leave the same unto some one or more of his own relations, so that the same should not at any time or in any manner go to any of the family of Witts.

Elizabeth Steere made her will, as follows:

"The family plate and jewels I will not bequeath to any grand-child; but as a sincere mark of esteem for my husband's memory leave them to be disposed of as he has mentioned in his will if I did not leave them to either of the children."

[* 504] * So I do not think, the great opinion of Lord Thurlow can be called in aid of the construction contended for in this case; for in that will there was that, which is decisive, that, if there were any grand-children of the testator's daughter Martha, he intended, such grand-children or grand-child should have it.

Several other cases were mentioned; which it is not material to detail: the question being only as to the principle to be deduced from them. There is one string of cases, such as *Pierson v. Garnet* (1). Though they were not much relied upon, the principles of them apply directly to the present case. It appears to me upon looking very accurately into those cases, that it is perfectly clear, that, though the power is given in such a manner, as clearly to show, a great latitude of selection was intended, such as the Court could not possibly take upon themselves to exercise, and though there was as much reason in those cases as in this to contend, that the testator meant only such as should be selected, yet in all those cases the Court have held, that there was a clear trust, with a power to be exercised; and that the non-exercise of that power could not prevent the Court from giving it to the objects of the trust. It is said, that in that case it is hardly possible to know, what the testator meant; and he had no wish to give to descendants, except those to be selected; and the argument urged is, that in all those cases the Court is to see, whether an intention appears, that the person shall have a trust reposed in him, leaving him nothing but a power of distribution; and if so, though a power of selection is added, which, I admit, the Court cannot exercise, yet the moment it is determined to be a trust, that trust shall never fail by the non-execution, or the inability of the trustee to exercise it (a).

(1) 2 Bro. C. C. 38, 226; Prec. Chan. edition by Mr. Finch, 210.

(a) *Gibbs v. March*, 2 Metcalf, 243, 251, 253; 4 Kent, (5th ed.) 343, 344; *Bull v. Vardy*, ante, 1 V. 270, note (a); Sugden, Powers, (4th Lond. ed.) 397, *et seq.*; 2 Story, Eq. Jur. § 1061, 1068, 1068 a, 1069, 1070, 1071, 1072, and a full and thorough discussion of this subject in the text and notes. See also the numerous cases referred to in the notes. See farther 1 Story, Eq. Jur., § 98; *Pierson v. Garnet*, 2 Bro. C. C. (Am. ed. 1844,) 47, note (a), 231, note (c); *Harland v. Trigg*, 1 ib. 144; *Wynne v. Hawkins*, ib. 181; *Padmore v. Gunning*, 7 Sim. 644; *Wood*

Lord Kenyon in *Pierson v. Garnet* refers to *Richardson v. Chapman* (1); which is a very material case. It went to the House of Lords from the decree of Lord Northington. It shows, that, however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons, who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute, it, as the testator *intended he should execute it. When one reads [*505] the nature of that trust, how difficult it was to make the selection, it is decisive to show, the Court must do it; though the trust is in its nature so discretionary. In that case there was an absolute gift by the Archbishop of his options upon a trust. See, what that trust is: to present such of persons mentioned, a very large number, not only particular persons, but domestics and other friends, according to their discretion. They could not have given among all the objects; which may be done in this case. In that there must have been some selection; and the persons to take could only take according to the sound discretion exercised by the trustees. That case is well known; and made a great noise. Therefore there is no occasion to state it. The trustee tried first to give as much as he could to himself. At all events he could not give it to himself. He then fixed upon a person, with whom he appeared to have made a bargain for a living by his presenting that person and then getting him to exchange. All this was put an end to; and then finding, he could not make that exchange, he made a presentation to Mr. Venner; swearing positively, that he made it without any condition or restriction whatsoever; and that he did verily believe that person to be the most proper person according to the trust. Lord Northington thought it that sort of trust, that this Court could not execute; that he could not judge of the merits of those persons: that it was left entirely to them; and he dismissed the bill: thinking, he could not interfere. Upon the appeal, very luckily for the appellant Dr. Richardson, the other persons, who stood prior to him, not appearing, the House of Lords reversed the decree; and ordered the presentation to be made to the appellant Dr. Richardson.

Lord Kenyon alluded to this case, as establishing, that if a trust can by any possibility be exercised by the Court, the non-execution by the trustee shall not prejudice the *Cestui que trusts*.

Then it comes to the only question; whether this is a trust or a power. The distinction between a trust and a power (2) is very nice, I admit; when we come to see *The Duke of Marlborough v.*

v. Cox, 2 Mylne & Craig, 684; *Ford v. Fowler*, 3 Beavan, 146, 147; *Pope v. Pope*, 10 Sim. 1.

If the trustee should decline or refuse to act at all, the Court would appoint other trustees, if necessary, to carry the trust into effect. *De Peyster v. Clendenning*, 8 Paige, 296; 2 Story, Eq. Jur. 1061.

(1) 5 Bro. P. C. 400. See *Potter v. Chapman*, Amb. 98.

(2) *Post*, 856.

Lord Godolphin. In that case it was held merely a power. I confess, if it were not for that authority, I think, there is great reason to contend, that it was an absolute gift to the children, [* 506] with a power of *selection only. The Report is nearly accurate. The testator by his will gave an absolute legacy of 30,000*l.* to his wife. He appointed executors; and made his eldest son residuary legatee. The Register's Book (1) states the words of the codicil as follows :

"My farther will and meaning is, that the legacy given and bequeathed by this my will to my wife shall be to her own use and benefit for and during her natural life only; and from and after her decease the said whole legacy be divided and distributed amongst such of my children and in such manner and proportions as the said Countess shall by any deed or instrument in writing or by her last will direct and appoint, and to no other use or purpose whatsoever; and for the better performance of the same my will is, that the said legacy and every part and parts thereof shall from time to time be placed out and disposed of by my executors, and the survivor and survivors of them, with the approbation of the said Countess and for her benefit."

Lord Hardwicke upon consideration of this case was of opinion, that it was a mere power, and not a trust: the legacy was to such children as she should appoint, and to nobody else; he could not find any intention in favor of the children, except as they were objects of her bounty, as well as of his. His Lordship does not, as I have before observed, seem to quarrel with *Harding v. Glyn*; and he considered it merely upon the question, whether it was a trust or a power.

If therefore this is a power, the power not being exercised, no person can claim to have it exercised at all. I think, I am also warranted by *Harding v. Glyn* to say, that, wherever the whole interest is given, as it is in this case as to the Brize Norton estate, and in words, which, I see, were much relied upon at the former hearing, namely, "to employ," he is clearly made a trustee, and for the whole interest. I cannot think, the words "authorize and empower" can have the effect of turning this into a mere power. Such words are little more than a declaration, what are the trusts, for which that person is already made a trustee. What does he authorize and empower him to do? To receive the remainder of the rent, [* 507] to take 100*l.* a-year to himself, &c. Those words * seem inserted, because he was to be a trustee for himself to a certain point. I was of opinion before, and upon full consideration I am still of opinion, that the Court are bound under those words to hold, that it was the intention, that John Brown should give to the children of Samuel Brown, or William Augustus Brown; with a power to select, as he should think proper; that the testator did not mean, any part of the trust should remain unexecuted, as long as

there were children ; and the fair construction is to give it to the children.

I have very fully considered this point. It is certainly a point of considerable difficulty : but upon the best consideration my opinion remains unaltered ; that upon the true construction of this will, and the principles laid down in *Pierson v. Garnet* and the other cases, (a) this is a trust, and the trustee having died without executing it, or transgressing, or refusing to execute it, shall not prevent its being held an absolute benefit for the objects, with a power to give a preference. I put this case at the former hearing. Suppose, there had been but one child. The trustee in that event could not possibly select, or strictly execute his trust. He could not say, that child was more deserving, nor, that he was undeserving. In *Pierson v. Garnet* there is no doubt, that if Mr. Pierson dies without making the selection, if he thinks proper not to give it to any, it would be a trust for all. It was not contended that it would be an intestacy in that event ; as it must be, if the argument now urged prevails. In *Bull v. Vardy* (1) Lord Chief Baron Eyre's opinion and reasoning are in favor of my opinion. The testator did not give to his wife any interest in the general produce of his estate : so it was a mere power. The Chief Baron asks, whether it can be considered, that a testator giving a power to give 100*l.* to A. intended A. to have that sum at all events ; and that it is only a circuitous way of giving that sum to A. It is impossible from the very nature of it ; for it would be an absolute gift at all events ; whether the power was exercised, or not. As to the 800*l.* there were no objects pointed out. As to the other two sums it was a mere power : the testator not having bequeathed the thing, or given any interest in it. The Chief Baron was of opinion, they were words of power, and not of trust ; and I freely own, I agree with him upon that will. But upon this will there is sufficient to show, the testator meant a bounty to the children ; that he considered them as the objects : with a power only to John Brown to select, if he should find any of them more deserving than another.

I am very glad, this case has been so well discussed. [* 508] It has given me an opportunity, which I always should wish for, when any opinion of mine seems to clash with that of so great a man as Lord Hardwicke. This was certainly a very proper cause to be reheard. The deposit must be paid to the Plaintiffs ; and the Defendants as residuary legatees will get all the rest : but if these were parties, whose circumstances made it an object, I should not think, they ought to pay for bringing this re-hearing forward.

With respect to the Lower Swell estate, I desire, it may not be understood to be my present opinion, that there is a trust as to that. My opinion, as far as it goes, without deciding a point, which I am

(a) See 2 Bro. (Am. ed. 1844,) 231, note (c), and cases cited, p. 37, note (1).

(1) *Ante*, vol. i. 270 ; [note (b).]

not obliged to decide, is with the Defendants. But I shall make no declaration as to that. (1)

SEE, *ante*, the notes to S. C. 4 V. 708.

BOWLES v. ROUND.

[1800, JULY 19.]

OBJECTIONS by a purchaser by auction, 1st, that a way round and across a meadow was not specified: (a) 2dly, on account of a bidding for the Plaintiff: a specific performance was decreed with costs. (b)

THE object of the bill was to obtain a specific performance of an agreement entered into by the Defendant to purchase a meadow, called Burnett's Meadow near Clewer; which was sold by auction to the Defendant for 950*l*.

The principal objections made by the Defendant were, first, that the premises were described as a meadow, consisting of fifteen acres, without any notice of a way round, and a foot-path, across it: secondly, that the lot was raised to an extravagant price by puffing.

(1) See *post*, the decree affirmed upon appeal by Lord Eldon, C. vol viii. 561, and by the House of Lords in 1813. *Cole v. Wade*, xvi. 27; *Walter v. Maunde*, xix. 424.

(a) See, *ante*, *Calverley v. Williams*, 1 V. 210, note (a); *Calcraft v. Roebuck*, ib. 221, note (a); *Craven v. Tickell*, ib. 60, note (a); 1 Sugden, Vend. & Purch. (6th Am. ed.) ch. 7, § 4, p. 536, 537, and notes, and cases cited; Chitty, Cont. (6th Am. ed.) 295-297, and notes; 2 Kent, (5th ed.) 468-471.

But specific performance will be refused where there is any *substantial* defect in the estate sold, or any imposition or fraud upon the purchaser. *Abbott v. Allen*, 2 Johns. Ch. 519; *Johnson v. Geer*, ib. 546; *Chesterman v. Gardner*, 5 ib. 29; *Bumpas v. Gardner*, ib. 79; *Deniston v. Morris*, 2 Edw. 27; *Bumpas v. Platner*, 1 Johns. Ch. 213; *Pringle v. Samuel*, 1 Litt. 46; *Woods v. Hall*, 1 Dev. Eq. 411; *Sherwood v. Salmon*, 5 Day, 439; 1 Story, Eq. Jur. § 142, *et seq.*

(b) See note (a), to *Bramley v. Alt*, *ante*, 3 V. 620; 2 Kent, (5th ed.) 537, *et seq.*; 1 Sugden, Vend. & Purch. (6th Am. ed.) 19, [28], *et seq.*; *Jenkins v. Hogg*, 2 Const. 821; *Steele v. Ellmaker*, 11 Serg. & Rawle, 66; *Moncrieff v. Goldborough*, 4 Harr. & M'Hen. 282; *Morehead v. Hunt*, 1 Dev. & Bat. 35; *Wolfe v. Luyster*, 1 Hall, 146; *Baham v. Bach*, 13 Louis. 287; W. W. Story, on Contracts, § 183, note (5).

It is said by Mr. Chancellor Kent, that in sound policy no person ought, in any case, to be employed secretly to bid for the owner against the *bona fide* bidder at public auction. 2 Kent, (5th ed.) 539. See also *Crowder v. Austen*, 3 Bingh. 368. The rule of law upon this subject seems however not to be so strict; and to a certain extent bidders may be employed by the seller to prevent sacrifices of the property sold. 2 Kent, (5th ed.) 537, 538; *Williams's Case*, 3 Bland, 186; 1 Madd. Ch. Pr. (4th Am. ed.) 324, 325; Fonbl. Eq. b. 1, ch. 4, § 4, note (z), and the other authorities cited above. Not however to enhance the price. *Morehead v. Hunt*, *Woods v. Hall*, *Wolfe v. Luyster*, cited above; *Wheeler v. Collier*, M. & Mal. 126; *Smith v. Greenlee*, 2 Dev. Eq. 126; Chitty, Cont. (6th Am. ed.) 298, 692, and notes; 1 Story, Eq. Jur. § 293. See also *Phappen v. Stickney*, 3 Metcalf, 384, 386, 387; *Twining v. Morrice*, 2 Bro. C. C. 326.

The *Attorney General* [Sir John Mitford] and Mr. Thomson, for the Plaintiff, pressed for a decree with costs: the Defendant having raised several objections; none of which he could sustain. The way round the field was stated by the answer to be a public road: but upon the evidence it appeared to be only a foot-path; and the answer stated, that the Defendant was owner of a house and ground adjoining.

Upon the other objection, they said, the person bidding [* 509] for the Plaintiff was declared by the auctioneer. It was put up at 900*l.* The Defendant bid 910*l.*: the person employed for the Plaintiff bid 920*l.*: and it was knocked down to the Defendant at 950*l.*

The *Solicitor General* [Sir William Grant] for the Defendant, observed upon the variance from the description, and the disadvantage arising from this way; which by length of time had become very wide.

LORD CHANCELLOR [LOUGHBOROUGH]. Certainly the meadow is very much the worse for a road going through it: but I cannot help the carelessness of the purchaser; who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill with costs (1).

1. THAT a vendor (not professing to sell "without reserve") may fairly employ a single bidder to attend an auction sale, in order to prevent his property from being sacrificed. See, *ante*, the note to *Bramley v. Alt*, 3 V. 620.

2. In other cases, besides the principal one, and by Courts both of Law and of Equity, it has been held, that where a defect was plainly visible, there an affirmation by the vendor that no such defect existed, does not bind him to make it good: the imposition and fraudulent intent may be indisputable, yet the vendee has no right to complain, at law, of a *tort*; nor, according to the language of the present case, and some others, will Equity relieve a man from the consequences of his own negligence and *laches*, as to such obvious matter: *Facey v. Merril*, Cro. Jac. 387; *Pasley v. Freeman*, 3 T. R. 54; *Grant v. Munt*, Coop. 177; *Dyer v. Hargrave*, 10 Ves. 507: but, in other cases, it has been held the misrepresentation of a fact, whether latent or patent, will, at all events so long as a purchase contract remains unexecuted, be a sufficient ground for resisting specific performance; *Wall v. Stubbs*, 1 Mad. 81; and if the party who has been misled, (even as to a fact which he had the means of making himself perfectly acquainted with,) had paid a deposit on account of such contract, he may recover it back in an action for money had and received. *The Duke of Norfolk v. Worthy*, 1 Campb. 337.

3. Though authorities in accordance with the principal case have been above cited, yet Lord Manners has observed that he remembered the case perfectly well, and that the bar was not satisfied with the decision: *Ellard v. Llandaff*, 1 Ball & Beat. 249: coupling this declaration with the opinion declared by Sir Thomas Plumer, in *Wall v. Stubbs*, *ubi supra*, it can hardly be considered as a settled point, whether the Court of Chancery would, or would not, decree performance of a contract, as to which there had been any sort of misrepresentation, wilful or innocent, with regard to the most obviously patent fact. But it seems pretty clear, that if a vendor, or lessor, without entering into an express and formal warrant,

(1) See 1 Ball & Beat. 249, 250. For the principles of equitable jurisdiction upon sales by auction, with respect to a defective description, see *Calverley v. Williams*, and *Calcraft v. Roebuck*, *ante*, vol. i. 210, 221, and the note, 226; and as to the practice of bidding on behalf of the vendor, *Bramley v. Alt*, *Conolly v. Parsons*, *ante*, vol. iii. 620, 625, *n.*; *post*, *Smith v. Clarke*, xii. 477.

has made a representation which he, on reasonable grounds believed to be accurate; though such representation should prove to be erroneous, yet, after the conveyance, or lease, has been completely executed, the purchaser, or lessee, can obtain no relief. *Legge v. Croker*, 1 Ball & Beat. 515. On the other hand, even a verbal representation, which is not correct, though the party making it believed it to be so, may render it impossible for him to obtain performance of an executory contract; and, when one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, a Court of Equity will rescind a contract, after it has been completely executed. *Edwards v. M'Leay*, Coop. 312; S. C. on appeal, 2 Swanst. 289. See the note to *Wakeman v. The Duchess of Rutland*, 3 V. 233.

BOLGER v. MACKELL.

[1800, JULY 21.]

THE rule, taken from the Ecclesiastical Court, that a direction postponing the payment of a legacy does not prevent the vesting, prevails in Courts of Equity as to personal legacies: unless a contrary intention can be inferred; as, where the time of payment forms part of the description of the person to take. (a) The vesting of a residuary bequest is especially favored, to prevent an intestacy; and a direction, that the interest should accumulate and be paid with the capital, after a deduction for maintenance and preferment, is not sufficient to prevent it. As to real estate the contrary rule prevails, but subject to exceptions.

Bequest to be equally divided share and share alike: they take in common; and no survivorship, (b) [p. 510.]

A rehearing is the proper mode of impeaching a decree, not signed and enrolled, for error, [p. 510.]

Costs of course upon a bill of review for error; where no error in the decree, [p. 510.]

CATHERINE UNDERHILL by her will, dated the 4th October, 1776, disposed as follows:

"And as to my worldly estate, after all my just debts, funeral ex-

(a) See *Bunch v. Hurst*, 3 Desaus. 286; *Perry v. Rhodes*, 2 Murph. 140; *Marsh v. Wheeler*, 2 Edw. 156; *Rope v. Sowerby*, Tamlyn, 376; *Howe v. Pillans*, 2 Mylne & Keen, 15; *Caldwell v. Kinkead*, 1 B. Monroe, 231; *Lister v. Bradley*, 1 Hare, 10; *Vize v. Stoney*, 2 Dru. & Walsh, 659; *Watson v. Hayes*, 9 Sim. 500; *Chesnut v. Strong*, 1 Hill, Ch. 123; *Kihler v. Whiteman*, 2 Har. 401; *Breedon v. Tugman*, 3 Mylne & Keen, 289; *Tunstal v. Bracken*, 1 Bro. C. C. (Am. ed. 1844,) 124, note, and see also cases cited in other notes to the same page; 2 Williams, Executors, (2d Am. ed.) 880, *et seq.*; *Mackell v. Winter*, *ante*, 3 V. 236; *Batsford v. Kebbell*, *ib.* 363, note (b).

A legacy to be paid when the legatee attains majority, is vested, though contingent, and should be paid to the trustee designated by the will. *Caldwell v. Kinkead*, and *Lister v. Bradley*, cited above. See also *Rope v. Sowerby*, Tamlyn, 376; *Cudworth v. Hall*, 3 Desaus. 256; *O'Driscoll v. Koger*, 2 Desaus. 295; *Dan-son v. Killett*, 1 Bro. C. C. (Am. ed. 1844,) 123, 124; *Barne v. Allen*, *ib.* 182; *Clapp v. Sloughton*, 10 Pick. 463; *Ferson v. Dodge*, 23 Pick. 287.

(b) 2 Williams, Executors, (2d Am. ed.) 1046, 1047; *Perkins v. Baynten*, 1 Bro. C. C. 118.

In America the title by joint-tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in cases of titles held by trustees and in conveyances to

penses, and charges of proving this my will, are paid and satisfied, I give, devise, and dispose of, the same in manner following: "

The testatrix then gave and bequeathed to her mother Mary Snowden the legacy or sum of 1000*l.*; to her brother James Snowden the legacy or sum of 2000*l.*; and the legacy or sum of 500*l.* to each of his children: to her brother-in-law James Winter the legacy or sum of 1000*l.*; and to his daughter Catherine 1500*l.* Then after giving several other legacies in the same *manner, [*510] she gave and bequeathed the interest or dividends of 150*l.* to Susannah Winship, to be paid to her half-yearly for her life, and the principal at her death to be considered as part of the residue of her (the testatrix's) personal estate; and in like manner she gave and bequeathed the interest or dividends of 2000*l.* to her brother John Snowden, to be paid to him half-yearly during his natural life; and the principal at his death to go and be considered as part of the residue of her personal estate. She then gave some small legacies; which she directed to be paid in twelve months after her decease; and devised to James Snowden and Jane Winter, their heirs and assigns, the house she lived in; in trust to permit her mother to live therein rent free, or to receive the rents and profits, and to hold, enjoy, and make use of, all the plate, linen, china, pictures, household goods and furniture, in the same at the time of her death, during her natural life.

And as to the rest, residue, and remainder, of all her real and personal estate, of what nature and kind soever and whatsoever, she gave, devised, and bequeathed, the same to the said James Snowden and James Winter, whom she appointed her executors, upon trust to lay out the same upon Government or real securities; and the interest and dividends thereof she directed to go and be paid to her mother for life; and at her death she directed the house and household goods, plate, linen, china, and furniture, to be sold, and the money arising thereby with the aforesaid residue of her personal estate she gave, devised, and bequeathed, to the daughter of the said James Winter and to the lawful children of the testatrix's said brothers John Snowden and James Snowden, to be equally divided betwixt them, share and share alike: the shares of the sons with the interest or accumulations thereof to be paid at their ages of twenty-one years, and of the daughters at twenty-one or marriage, after a deduction of what may be laid out for their maintenance and preferment in the world.

husband and wife. 4 Kent, (5th ed.) 361, 362. See *Shaw v. Hearsey*, 5 Mass. 522; *Burghard v. Turner*, 12 Pick. 534; *Miller v. Miller*, 16 Mass. 59; *Adams v. Frothingham*, 3 Mass. 352.

See also for cases on this subject, 2 Hilliard's Abr. of Law of Real Estate, ch. 4, p. 42, 43, 44.

The words "equally to be divided in equal shares," in a will, create a tenancy in common. *Drayton v. Drayton*, 1 Desaus. 329.

So the words "share and share alike." *Bunch v. Hurst*, 3 Desaus. 288. See also, *Woodgate v. Unwin*, 4 Sim. 129; *Westcott v. Cady*, 5 Johns. Ch. 334.

The testatrix died on the 14th of November, 1776. Her brothers James George Snowden, in the will called James Snowden, and John Snowden died; the latter without issue: the former leaving two sons George Snowden and John Snowden; who died under twenty-one intestate, and without issue; leaving their grandfather James Noble their administrator and next of kin.

[* 511] * A bill was filed in 1779 by Catherine Winter and her father; and in 1783 the usual decree was made, establishing the will, and directing the accounts. Several proceedings were had in that cause, down to the year 1790; and upon the 26th of July in that year, the cause coming on at the Rolls for farther directions, a decree was made; directing that after certain deductions one third of the residue of 32,577*l.* 14*s.* 8*d.* 3 per cent. Consolidated Bank Annuities and of other stock should be carried to the account of the Plaintiff Catherine Winter; and that the remaining two thirds should be carried to the account of the personal estate of James Noble in the cause of *Wilson v. Mackell*, instituted upon a bill against the executors of Noble for an account of his personal estate. Subsequent orders were made upon the same ground, that the residue of the personal estate of Mrs. Underhill vested in thirds.

Catherine Winter having attained the age of twenty-one in 1796, and married James Bolger, they filed this bill against the executors of Noble and Legatees under his will; stating, that the decree pronounced in 1790, has not been enrolled; and therefore the Plaintiffs are not entitled to file a bill of review, but are entitled to have it re-considered by a bill in nature of a bill of review, and to have that decree and two orders, made upon the 30th of July, 1793, and the 31st of March, 1794, reversed; on the ground that the residue under the will of Mrs. Underhill did not vest in any of her residuary legatees, unless such residuary legatee should attain twenty-one, or, if a daughter, be married; and that George Snowden and John Snowden having died under the age of twenty-one, the whole residue vested in Catherine Bolger. The bill prayed a declaration accordingly.

The *Attorney General*, [Sir John Mitford], for the Defendants objected to the bill, as irregular; and that the question ought to have been brought forward upon a re-hearing. It was agreed, however, that the cause should proceed; and, if the plaintiffs could sustain the point, that it should be brought on in the regular form.

The *Solicitor General*, [Sir William Grant], Mr. Campbell, and Mr. Mackintosh, for the Plaintiffs. The Plaintiffs contend, that either the whole in the event, that has happened, belonged to Catherine Bolger by implied survivorship, upon the supposition, that this was a joint bequest, till the parties should attain twenty-

[* 512] one, or upon the supposition, * that the shares were immediately given as divided shares, but did not vest till the age of twenty-one respectively, one third in her own right, and, as one of the next of kin of the testatrix, a share of the other two thirds, as being undisposed of.

In the first part of the will several legacies are given absolutely to each of these residuary legatees and other persons. The testatrix intended only what was strictly necessary for their maintenance to be applied during their infancy. It is clear, that if it were not for the direction for payment at the age of twenty-one, the vesting would not take place till that period: but it is said upon that direction, that the payment only is suspended. That was the argument used upon the will of Mary Snowden in a cause (1) between the same parties: in which your Lordship, reversing the decree of the Master of the Rolls, held, that the whole residue under that will survived to this Plaintiff. In some respects the residuary clause in that will entirely agrees with this: in others, I admit, there is a considerable difference. Your Lordship in that case disapproved of the rule upon this subject, taken from the Ecclesiastical Court, that where the time is annexed, not to the gift of the legacy, but to the payment, the legacy is vested; observing, that it was never treated with much respect; and is not founded upon any principle of interpretation: a rule, which Lord Cowper long ago observed was adopted upon very slender grounds; and which Courts of Equity have shown a solicitude to circumscribe and narrow: *Yates v. Fettiplace* (2), before Lord Somers. *Jennings v. Looks* (3), *Prowse v. Abingdon* (4), *Steadman v Palling* (5). Not only the principal is not given by this will till the age of twenty-one, but, as your Lordship observed in *Mackell v. Winter*, not even the income * is given till that period; but maintenance only is given [*513] out of it. *Harrison v. Buckle* (6) shows the reason of all those cases. It has been decided, that, where the words are manifestly future, as "I give at twenty-one," yet a direction for payment of interest shall vest the legacy; being evidence of an intention to vest it. By parity of reasoning, where the words are such as by the common rule would vest the legacy, the circumstance, that the interest is not to be paid, supersedes the application of the rule.

But, if there is no implied survivorship, at least these lapsed legacies are undisposed of, and then the Plaintiff going upon the intestacy does not want the aid of the intention.

LORD CHANCELLOR [LOUGHBOROUGH]. You argue very properly

(1) *Mackell v. Winter*, ante, vol. iii. 236, 536.

(2) 2 Vern. 416; Prec. Ch. 140.

(3) 2 P. Wms. 276.

(4) 1 Atk. 482.

(5) 3 Atk. 423. See the cases collected and arranged by Mr. Cox in his note, 2 P. Wms. 612, to *The Duke of Chandos v. Talbot*. See also Mr. Butler's note, Co. Lit. 237 a; Mr. Fonblanque's notes to *The Treatise of Equity*, vol. i. 439, vol. ii. 202, 366, 2d ed. and Mr. Sanders's notes to *Prowse v. Abingdon*, *Steadman v. Palling*, *Hall v. Terry*, *Van v. Clarke*, 1 Atk. 502, 510, and *Louther v. Condon*, 2 Atk. 127. The late cases, in which this subject has been discussed, are *Pearce v. Loman*, *Batford v. Kebbell*, *Wadley v. North*, *Phipps v. Lord Mulgrave*, ante, vol. iii. 135, 363, 364, 613; *Booth v. Booth*, ante, iv. 399. As to the rule, that a legacy payable at a future time shall not in general carry interest before the time of payment, and the excepted cases, see *Crickett v. Dolby*, ante, vol. iii. 10, and *Tyrrell v. Tyrrell*, iv. 1.

(6) 1 Str. 238. See Mr. Nolan's notes, 3d edition.

upon a lapsed legacy : but this is a residue ; and therefore your construction is to produce an intestacy. You might argue a little upon the intention, where the legacy is to fall into the residue, and the legatee does not arrive at the period : but it is difficult to argue upon the intention, where it is to produce a partial intestacy (1) (a). I observed in the former case, that the distinction was founded in this ; that it is a distinction settled undoubtedly in the Ecclesiastical Court from the Roman law (2). This Court has not adopted it, where it is not compelled, as to land (3) : there is also the consideration for the heir as to that. I see from the Report of that case, I intimated, that if it were not for the circumstances in that case, I felt myself compelled to follow the rule. The decisions of the Courts as to the personal estate must be uniform. But what governed my opinion in that case was, that I must have struck out of the will the limitation over by holding, that those were vested legacies ; for there could not be a case, in which that limitation could take effect : the legatee over taking nothing but in the event of the deaths of the grandsons under twenty-one and of the grand-daughter under that age, and unmarried ; and also there was a very clear, though not a very well expressed, intention in the will, that there should be cross remainders. In this will it is a mere tenancy in common. There is nothing to show an intention of survivorship, or that one should take, if the other should not arrive at the time marked out. This is a mere bequest of the residue of [* 514] * personal estate, payable at twenty-one. The rule must take place ; and the mere addition of a direction, that maintenance shall be deducted, will not prevent it.

The Attorney General, [Sir John Mitford], for the Defendants. The disposition of Courts of Equity in this country, instead of being to get rid of this rule, has been to extend it ; for they only hold themselves bound to consider legacies not vested, because the Ecclesiastical Courts have so determined : but the object of Courts of Equity is, that personal property shall be considered vested ; unless the contrary appears ; and that the opposite rule shall hold as to real estate, for this reason ; that it is most convenient, that personal property should be distributed at the death, and that real property should not be charged. Determinations have been made over and over upon those grounds. There cannot possibly be any doubt upon this case. The question in *Mackell v. Winter* arose upon the bequest over : but for that your Lordship felt yourself bound to follow the

(1) See *ante*, *Milson v. Andry*, 465 ; *Philipps v. Chamberlaine*, *Booth v. Booth*, vol. iv. 51, 399 ; where this distinction was relied on by the Master of the Rolls, 2 Mer. 386.

(a) Courts favor the vesting of interests. *Olney v. Hull*, 21 Pick. 311, 314 ; *Dingley v. Dingley*, 5 Mass. 535 ; *Bowers v. Porter*, 4 Pick. 198 ; *Shattuck v. Stedman*, 2 Pick. 468, 469 ; 2 Madd. Ch. Pr. (4th Am. ed.) 13, 14 ; and more especially in cases of residuary bequests, to prevent intestacy, 2 Madd. Ch. Pr. *ubi supra* ; *Leake v. Robinson*, 2 Meriv. 386.

(2) *Post*, vol. vi. 245.

(3) *Pearce v. Loman*, *ante*, vol. iii. 135.

distinction ; as the Master of the Rolls had done. Lord Thurlow's distinction was (1), where the time is so annexed to the gift as to form part of the character of the person to take, so as to raise a condition precedent, there the construction of the Roman law, vesting the interest, does not take place : but where the time is appointed for the convenience of the fund, as six years after the testator's death, or, as in many cases, at the death of the person, who takes for life, according to the leading case in *Ventris* (2) and *Pinbury v. Elkin* (3), the rule postponing the vesting till that time does not apply.

Lord CHANCELLOR [LOUGHBOROUGH]. There was a case (4) lately before me, where a legacy was suspended till the age of thirty-two : and I followed the distinction of Lord Thurlow ; holding it a description of the person to take.

This is within all the cases. Therefore the bill must be dismissed. As to the costs, taking this to be a bill of review upon error, it follows of course, that they must pay the cost, when there is no error in the decree.

SEE, *ante*, the notes to S. C. 3 V. 236.

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- (1) *Dawson v. Killet*, 1 Bro. C. C. 119 ; 2 Ventr. 342.
 - (2) Anon. 2 Ventr. 347 ; *Clobberie's Case*.
 - (3) 1 P. Will. 564.
 - (4) *Batford v. Kebbell*, *ante*, vol. iii. 363, see the note, 364.
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BLOUNT v. BESTLAND.

[1800, JULY 22.]

A LEGACY to a married woman is not sufficiently reduced into possession by an appropriation by the executrix of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. (a)

Election decreed between two claims under and against a will, (b) [p. 515.]

Settlement directed of a legacy to a married woman claimed by her husband, (c) [p. 515.]

An action does not now lie by a husband for a legacy in right of his wife, (d) [p. 516.]

SARAH BREWIN by her will gave to Ann Simpson, wife of Thomas Simpson, the sum of 600*l.*, to be paid her by the executrix of the

(a) *Adams v. Lavender*, M'Clel. & Y. 41; *Wallace v. Taliatferro*, 2 Call, 447; *Robinson v. Brock*, 1 Hen. & Munf. 214. Neither a legacy to a wife, nor a distributive share in an estate, in which she is interested, vests in the husband absolutely. *Wildman v. Wildman*, 9 Ves. 177; 2 Kent, (5th ed.) 135; *Gallego v. Gallego*, 2 Brock, 285; *Cannon v. Ulmer*, 1 Bai. Eq. 204; *Price v. White*, ib. 195; *Adams v. Lavender*, M'Clel. & Y. 41. They are not like her personal property in possession, which becomes absolutely his. But they are classed with and sometimes called her *chores in action*. Clancy, Rights of Women, (Am. ed.) 133, 134; 2 Story, Eq. Jur. § 1402; *Snowhill v. Snowhill*, 1 Green, Ch. 30. If the husband reduces them to possession, as he may, they become absolutely his own. Clancy, Ch. 8, B. 1, p. 109, *et seq.* (Am. ed.) And he may assign or release them for a valuable consideration by a deed to which she is not a party. *Saddington v. Kineman*, 1 Bro. C. C. (Am. ed. 1844,) 44, 51, notes and cases cited; *Tucker v. Gordon*, 5 N. Hamp. 564; 1 Roper, Husb. & Wife, 227, 237; 2 Kent, (5th ed.) 136, 137. But until he has reduced them into possession, or in some other way barred her right, he has only a qualified interest, and if he dies first the right survives to her. *Schuyler v. Hoyle*, 5 Johns. Ch. 196; 2 Kent, (5th ed.) 135; *Kiniger's Estate*, 2 Ashmead, 455; *Poindexter v. Blackburn*, 1 Ired. Eq. 286; *Hayward v. Hayward*, 20 Pick. 517; *Snowhill v. Snowhill*, 1 Green, Ch. 30; 2 Story, Eq. Jur. § 1402; *Bibb v. M'Kinley*, 9 Porter, 636; *Pickett v. Barber*, C. W. Dud. Eq. 238; 1 Williams, Executors, (2d Am. ed.) 605, *et seq.* See, farther, *Udall v. Kenney*, 3 Cowen, 590; *Legg v. Legg*, 8 Mass. 99; *Hovess v. Bigelow*, 13 Mass. 364; *Stanwood v. Stanwood*, 17 Mass. 57; *Ryland v. Smith*, 1 My. & Craig, 53; *Walker v. May*, 1 Bai. Eq. 58; *Hardie v. Cotton*, 1 Ired. Eq. 61. In *Commonwealth v. Manley*, 12 Pick. 175, it is said that a legacy given to the wife vests absolutely in the husband, and so the wife's distributive share in an intestate estate vests in the husband. So in *South v. Hoy*, 3 Monro, 93, it is said that the husband is entitled absolutely to his wife's distributive share in her father's chattels. See, also, *Shaw v. Burney*, 1 Ired. Eq. 148; *Pattie v. Hall*, 2 B. Monro, 462; *Ferguson v. Alcorn*, 1 B. Monro, 162.

In *Parsons v. Parsons*, 9 N. Hamp. 321, Parker, Ch. J. suggests, that the Court in *Commonwealth v. Manley*, *supra*, could have intended only to say, that the husband may claim or reduce his wife's share or legacy to possession, to his own use. See, also, *Snowhill v. Snowhill*, 1 Green, Ch. 30; *Wardlaw v. Grey*, 2 Hill, Ch. 651. The interest of a husband in his wife's distributive share in an intestate estate is subject to be attached in the hands of the administrator, by the trustee process in Massachusetts, at the suit of the husband's creditors. *Wheeler v. Bowen*, 20 Pick. 563. So of a legacy accruing to the wife during coverture. *Holbrook v. Waters*, 19 Pick. 354. But such attachment will not divest the wife's right of survivorship, in the event of the death of the husband before judgment. *Strong v. Smith*, 1 Metcalf, 476.

(b) See, *post*, 517, note (1)

(c) See, *post*, 517, note (2)

(d) In Massachusetts a husband may sue in his own right, for a legacy accruing

said will within twelve months after the decease of the testatrix ; and she appointed her niece Susannah Bestland executrix.

The testatrix died in 1790. Above a year after her death Thomas Simpson died ; having by his will disposed of the legacy of 600*l.* to his wife for life, and after her decease to his children ; and given his wife another inconsiderable benefit. His widow having two children by him, married William Blount. The bill was filed by Blount and his wife, claiming the legacy, against the executrix of Mrs. Brewin, the executor of Thomas Simpson, and the two infant children.

The defence set up by the answer of the executrix, and also supported by her depositions, taken from the children, was, that she became entitled as executrix to 600*l.*, secured to the testatrix, her executors, &c. upon a mortgage of the freehold estates of Wissendine, in the county of Rutland, belonging to the Defendant's mother ; and the Defendant, conceiving herself liable to pay to Thomas Simpson the legacy of 600*l.*, a short time after the expiration of twelve months from the death of the testatrix had some conversation with Simpson relative to the said legacy ; and she intimated her willingness to pay him the legacy ; but not having the money ready she told him, it should be paid by the money due upon the said mortgage upon the estate at Wissendine ; and that she would call in that money for the purpose of such payment, if he wished it. He said, he did not want it just then ; and he would rather it should lie, where it was, and he receive the interest, till he wanted it : to which the Defendant agreed. In consequence she paid him 12*l.* upon the 20th of October, 1791, and 12*l.* upon the 5th of June, 1792 ; taking receipts from him of those dates, expressed thus :

"Received of Susannah Bestland as executrix of Mrs. Sarah Brewin the sum of 12*l.* being for half a year's interest for 600*l.* left to my wife by Mrs. Brewin's will as charged upon the estate at Wissendine in Rutland."

* This conversation was not acted upon farther. The [*516] answer submitted the propriety of a settlement, if the Plaintiffs were entitled ; stating, that no settlement had been made upon the Plaintiff Ann Blount and her children upon her second marriage ; and that her husband had been her servant.

The *Solicitor General*, [Sir William Grant], and Mr. Romilly, for the Plaintiffs. The interest in this legacy survived to the wife upon the death of her first husband ; having never been reduced into possession. The transaction, that took place with the executrix, being only an agreement to appropriate that mortgage, was not sufficient to reduce it into possession. *Bates v. Dandy* (1) is exactly this case.

The *Attorney General*, [Sir John Mitford], Mr. Hollist, and Mr. Stanley, for the Defendants. It is very unfortunate, if this sum is

to the wife during coverture, either before or after her death. *Goddard v. Johnson*, 14 Pick. 352; *Hapgood v. Houghton*, 22 Pick. 480.

(1) 2 Atk. 207.

not to be considered so appropriated as to have vested in the first husband: who conceiving it his made a disposition of it in favor of his wife and children; for whom no provision has been made on the second marriage. It is clear upon the two receipts, that he accepted the mortgage as an appropriation to him of so much of the testator's estate in satisfaction of that legacy. *Bates v. Dandy* was very different. In this case the legal estate was in this Defendant; and after the transaction between her and Mr. Simpson he might have sued her without his wife. In the other case that was impossible; the wife being administratrix. The right of action therefore did not survive in this case.

2dly, The Plaintiff Ann Blount, if she is entitled, must elect (1), and therefore must give up all benefit under the will of her former husband; and, as this man has made no provision for her, some direction ought to be given for paying the money into Court.

The *Solicitor General* [Sir *William Grant*] in reply, observed upon the second point, that no question of election was raised by the answer.

LORD CHANCELLOR [LOUGHBOROUGH]. Could the first husband have brought a bill without making his wife a party? He [*517] could not bring an *action for the legacy (a); though that would have done at one time (2). All, that has been done, was nothing more than an executor admitting a legacy to be due, and that he has assets. No Court of Law would have entertained an action upon it; and if the husband had sued here, the wife must have been a party (b). It is very unfortunate. The least thing would have done: if she had assigned to him. I agree, this is an appropriation: but it is an appropriation of that, which is in effect a *chose in action*; and could only have been obtained by suit; to which the wife must have been a party. It is very proper that the money should be paid into Court.

I shall direct Susannah Bestland, in whom the mortgage is now vested, to call in the money; and declare, that the Plaintiff Ann Blount is entitled to the same; and the interest due at the time of her marriage with the other Plaintiff to be added to the principal; and that she is not entitled to any benefit under the will of Thomas Simpson; she electing to take against the will (c). Let the Plaintiff William Blount lay a proposal before the Master for a settlement. Tax all parties their costs: the interest of the sum due

(1) Upon the point of election, see, *ante*, *Wollen v. Tanner*, *Long v. Long*, *Yate v. Moseley*, 218, 445, 480; *Ward v. Baugh*, vol. iv. 623; *Wilson v. Lord John Townshend*, ii. 693, and the references in the notes, vol. i. 523, 7.

(a) *Schuyler v. Hoyle*, 5 John. Ch. 196; 2 Kent, (5th ed.) 138.

(2) *Ante*, vol. ii. 676. An injunction was granted at the suit of a married woman to stay proceedings in the Ecclesiastical Court in a suit instituted by her husband to obtain a legacy in her right, without having made a settlement: *Meakis v. Meakis*, in Chancery, Hilary Term, 1764, mss.

(b) See *Butricke v. Broadhurst*, *ante*, 1 V. 171, note (a), and cases cited; *Blake v. Bunbury*, ib. 514, note (a); S. C. 4 Bro. C. C. (Am. ed. 1844,) 21, 28, notes.

(c) 2 Story, Eq. Jur. § 1402, *et seq.*; *Sawyer v. Baldwin*, 20 Pick. 378; *Howard v. Moffat*, 2 John. Ch. 206, 208; *Fabre v. Colden*, 1 Paige, 166; *Smith v. Kane*, 2

upon the mortgage to be applicable to the costs in the first place; and if not sufficient the deficiency to be taken out of the principal (1).

SEE, *ante*, the notes to *Wright v. Rutter*, 2 V. 673.

Paige, 303; *Pryor v. Hill*, 4 Bro. C. C. (Am. ed. 1844,) 139, 143, notes. See a full discussion of this subject of settlement in such cases. *Parsons v. Parsons*, 9 N. Hamp. 309, 320, *et seq.*; 2 Kent, (5th ed.) 141, 142.

In some of the States the power of affording such protection to the wife does not exist. See 2 Kent, *ubi supra*; *Parsons v. Parsons*, *supra*; *Yoke v. Barnet*, 1 Binn. 358; *In Re Miller*, 1 Ash. 323. See farther on this subject, *M'Elhatten v. Howell*, 4 Hayw. 19; *Duwall v. Farm. Bank of Maryland*, 4 Gill & John. 282; *Dearin v. Fitzpatrick*, 1 Meigs, 551; *Bryan v. Bryan*, 1 Badg. & Dev. Eq. 47; *Tucker v. Andrews*, 13 Maine, 124; *Heath v. Heath*, 2 Hill, Ch. 104; *Rees v. Waters*, 9 Watts, 90; *Perryclear v. Jacobs*, 9 Watts, 509; *Helms v. Franciscus*, 2 Bland, 545; *Ball v. Montgomery*, *ante*, 2 V. 191, note (d); *Glen v. Fisher*, 6 John. Ch. 33; *Tattnell v. Fenwick*, 1 Desaus. 143; *Tevis v. Richardson*, 7 Monro, 660; *Elliott v. Waring*, 5 Monro, 340.

(1) See the next case, and the note, *ante*, vol. ii. 609.

LUMB v. MILNES.

[ROLLS.—1800, JULY 23.]

To prevent the marital right in property of a married woman a clear intention, that it shall be to her separate use, must appear: a mere trust to pay the interest to her for life was held not sufficient: the capital, being bequeathed according to her appointment, whether *covert* or *sole*, and in default of appointment, to her representatives, including her husband, was admitted to be to her separate use. (a)

Assignees of a bankrupt claiming property in right of his wife must make a provision for her, (b) [p. 518.]

GEORGE COTTON by his will gave all his real estate to his niece Elizabeth Milnes, her heirs and assigns for ever; and all the rest, residue, and remainder, of his money, securities for money, goods, chattels, personal estate and effects, he gave to trustees and the survivor, his executors and administrators; in trust to sell and dispose of the goods, chattels and personal estate; and the money thereby arising together with his ready [* 518] money to place out *at interest upon Government or real security; and out of the interest and produce to pay an annuity of 50*l.* to his brother-in-law Richard Hill by two equal half-yearly payments; the first payment to be made at the end of six months after the testator's decease; and he gave and bequeathed the said annuity to him accordingly; and in trust to pay

(a) No technical words are necessary to create a separate estate. Any words indicating that intention are sufficient. *Ballard v. Taylor*, 4 Desaus. 550; *Hamilton v. Bishop*, 8 Yerger, 33; 2 Story, Eq. Jur. § 1381; *Stanton v. Hall*, 2 Russ. & My. 175; *Newland v. Paynter*, 10 Sim. 377; S. C. 4 My. & Craig, 408.

Such intention, however, must be clearly indicated. 1 Madd. Ch. Pr. (4th Am. ed.) 471, 472; *Barrett v. Barrett*, 1 Desaus. 447, and the other cases above cited. A legacy to a married woman "for her own use and at her own disposal," vests in her as separate estate. *Prichard v. Ames*, 1 Turn. & Russ. 222; *Stanton v. Hall*, 2 Russ. & My. 175. A bequest to a married woman, "for her benefit independent of the control of her husband," will go to her separate use. *Simons v. Horwood*, 1 Keen, 7. See also *Margels v. Barringer*, 7 Sim. 482.

For other expressions which have been held to give the wife a separate estate, see 2 Story, Eq. Jur. § 1382; Clancy, Rights of Women, (Am. ed.) b. 3, c. 2, p. 262, *et seq.* For expressions which have been used in a bequest or instrument of conveyance and held not to give the wife a separate estate, see 2 Story, Eq. Jur. § 1383. The wife's power over her separate estate may be qualified by the expressions used in the instrument of conveyance. See 2 Story, Eq. Jur. § 1382 a. See farther on this subject, ib. § 1384, § 1385; 1 Madd. Ch. Pr. (4th Am. ed.) 471, 472; *Haig v. Haig*, 1 Desaus. 348.

As to the doctrine of Courts of Equity, in respect to the manner in which a married woman shall take and hold her separate estate, and her power over it, see *Hulme v. Tenant*, 1 Bro. C. C. (Am. ed. 1844,) 16, and notes to that case; 2 Kent, (5th ed.) 162, *et seq.* and notes; *Rich v. Cockel*, 9 Ves. 369.

(b) 2 Story, Eq. Jur. § 1411; *Pryor v. Hill*, 4 Bro. C. C. (Am. ed. 1844,) 139, and the notes; *Saddington v. Kinsman*, 1 ib. 44, and notes; 2 Kent, (5th ed.) 138-143; *Perryclear v. Jacobs*, 9 Watts, 509; *Mumford v. Murray*, 1 Paige, 620; *Steinnitz v. Halthen*, 1 Glyn & Jam. 64; *Van Eppes v. Van Deusen*, 4 Paige, 66; *Fry v. Fry*, 7 Paige, 462; *Martin v. Martin*, 1 Hoff. 462; *Burdon v. Dean*, ante, 2 V. 607, note (a); *Smith v. Kane*, 2 Paige, 303; *Ball v. Montgomery*, ib. 191, note (d).

the remainder of the said interest money, and also the said annuity of 50*l.* after the decease of Hill unto his said niece Elizabeth Milnes during the term of her natural life, to be paid her in two equal half-yearly payments; and the first payment thereof to be made at the end of six months next after his decease; and he did thereby bequeath the same to her accordingly; and upon farther trust to pay, and he did thereby give and bequeath, the sum of 1000 guineas to his nephew Richard Milnes at and immediately upon the decease of his said niece Elizabeth Milnes; and to be paid to him within six months next after: it being his intention, that the said legacy should vest in him upon her death: but in case his said nephew happened to die in the life-time of his said niece, then he directed, that the said legacy should not be paid at all, but should sink into the residuum of his personal estate, and be paid and disposed of in such manner as such residuum was payable by his will; and upon farther trust, that the said trustees should pay, apply and dispose of, all the rest, residue, and remainder, of his personal estate and effects, and he did thereby give and bequeath the same, to, for and upon, such uses, trusts, intents, and purposes, as she the said Elizabeth Milnes, whether *covert* or *sole*, should by any deed or writing by her sealed and delivered in the presence of and attested by two or more credible witnesses or by her last will and testament in writing, or any writing purporting to be her last will and testament, and by her signed and published in the presence of a like number of witnesses, limit and appoint; and in default of such appointment, to and for the use of the legal representatives of the said Elizabeth Milnes, including the said Richard Milnes, if then living, in a due and legal course of administration.

After the death of the testator Milnes and his wife levied a fine of the real estate to the use of such person and persons, for such estate and estates, and in such parts, shares and proportions, and to and for such uses, intents, and purposes, and in such manner and form, as Elizabeth Milnes at any time or times during her

* life notwithstanding her coverture, and whether covert [*519] or sole, by any deed or deeds, writing or writings, to be by her duly published in the presence of, and attested by, three or more credible witnesses, should appoint; and, for want of and until and subject to such appointment, where the same shall not be a complete appointment, to the use of Richard Milnes, his heirs and assigns for ever.

Richard Milnes afterwards becoming a bankrupt, the bill was filed by his assignees; charging that the fine and conveyance were voluntary; and praying, that the Plaintiffs may be declared entitled to the interest and dividends of the residuary personal estate, subject to the annuity to Hill, during the life of Elizabeth Milnes, and to the rents and profits of the real estate from the date of the bankruptcy and during the lives of her and Richard Milnes.

The defence set up was, that Elizabeth Milnes was entitled to the interests and dividends to her separate use. She had not executed any deed of appointment.

Mr. Sutton, Mr. King, and Mr. Cooke, for the Plaintiffs. First, as to the fine levied by Milnes and his wife to such uses as she should appoint, and in default of appointment, to him and his heirs, that does not vary the rights: but, if it is necessary to contend it, it is certainly voluntary as to the creditors.

As to the personal estate, the point is, whether the interest and dividends are given to the sole and separate use of Elizabeth Milnes. No direction of that sort, or, that her receipt shall be a discharge to the trustees, is contained in this will: nothing, that will deprive the husband of his marital right to the interest and dividends. No appointment could defeat that right during the marriage. The Court will not force a construction to give it to the separate use of the wife: *Brown v. Clark*. (1) There is no intention apparent in this will, as in *Lee v. Prieux*. (2) The husband is noticed as one of his family; and has a legacy; whence it is plain, the testator had no antipathy to him.

Mr. Richards and Mr. Benyon, for the Defendants. A clear intention for the sole and separate use of the wife must certainly *be shown; and a probable intention will not do.

Of late the cases have certainly inclined that way. In *Bennet v. Davis* (3) the husband was considered a trustee. Before that trustees were required. Another case of the same kind was before Sir Thomas Sewell. In this case there are trustees. In *Jones v. —* the disposition was to the wife for her own use (4): your Honor held, that it was impossible to maintain, that it was for the use of her husband: and that it must be intended for her separate use; though there were no trustees in that case. This testator certainly takes notice of the husband in a friendly manner: but that shows, he knew how to make a distinction between them. A strong circumstance of distinction in *Brown v. Clark* was the direction, that the husband should have no part of the capital; there being no such declaration as to the interest; from which a fair inference arose, that the testator did not mean to restrain him as to the interest. If this is not given to the separate use of Mrs. Milnes, the testator has done very little for her. He means to give her the whole property, subject to her own interest for life. In every such case the real intention must certainly be to give to her separate use; for it would be absurd to give to her, when it would immediately pass to her husband.

Mr. Sutton, in reply. Not only the expression is in favor of the

(1) *Ante*, vol. iii. 166.

(2) 3 Bro. C. C. 381.

(3) 2 P. Wms. 316.

(4) So, if to pay into her proper hands; *post*, 545: or for her sole use: *Adamson v. Armitage*, vol. xix. 416; Coop. 283. If the case here cited as *Jones v. —* is *Johnes v. Lockhart*, it is not correctly represented; as it appears by Mr. Belt's note from the Register's Book, 3 Bro. C. C. 383, that those words were held not to give a separate estate. See *Ex parte Ray*, 1 Madd. 199; *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491; *Prichard v. Ames*, 1 Turn. 222.

Plaintiffs, but the intention : as far as it can be collected from other parts of the will : if not, the Court must upon every legacy to be paid to a married woman hold, that it is given to her separate use. This will was evidently made with professional advice. When speaking of the principal the testator provides against any marital right ; using the words “ whether *covert* or sole.” In *Lee v. Prioux* your Honor hesitated some time, before you decided that to be the separate use of the wife ; upon the ground, that her receipt was directed to be a discharge to the trustee ; which circumstance is not in this will. The trustees cannot take any secure receipt here except from the husband.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. My opinion is with the Plaintiffs. Though the Court has upon a great number of wills guarded the interest of a married woman, the words in this will are not sufficient. The point is, whether there is any thing to show, the * husband was not intended to be entitled to what every husband is entitled to ; at least a participation by him with his wife, whose debts he is bound to discharge, and whom he is bound to maintain. It is necessary to show a decided intention, that the husband shall have no interest whatsoever. Some years ago the Court would have started at the proposition. Even in the strong case of *Lee v. Prioux*, where the words were much stronger than this will contains, it is truly said, I did not think fit without hearing the assignees of the husband to make the order : but upon argument I did hold, that the only purpose of putting in those words was to make that a discharge, that otherwise would not be a discharge ; which could be only by giving to the separate use of the wife. This testator has used words as to the principal, that give it to her separate use, but not as to the interest and dividends. Upon such words would any man advise the trustees to pay to the wife ? No payment to her can be good, unless it is perfectly clear, the testator has authorized it ; and this will has no words sufficient for that. Was it meant, that the wife should spend all this money, and not contribute any part of it to the expenses of housekeeping ? The intervention of trustees has never yet gone the length of vesting a sole and separate interest in the wife. In *Lee v. Prioux* I took a good deal of time to consider. Many people have disapproved very much of making them separate persons : the husband bound to maintain his wife ; and she having separate property, not one farthing of which she is to bring into the common fund.

I am of opinion therefore, the words of this will are not sufficient to give the interest and dividends to the separate use of the wife (a) ;

(a) See *Johnes v. Lockhart*, 3 Bro. C. C. (Am. ed. 1844,) 383, note ; 2 Story, Eq. Jur. § 1383, and cases cited ; *Tyler v. Lake*, 2 Russ. & Mylne, 183 ; *Kensington v. Dolland*, 2 Mylne & K. 184.

Although the money is to be paid into the hands of the wife or to her use, there is nothing in that inconsistent with its being subject to the rights of the husband. 2 Story, Eq. Jur. 1383, and note (1).

and the only Equity, to which she is entitled, is a provision out of them. Let it be referred to the Master for that purpose : the assignees to be at liberty to make a proposal (1).

The real estate was only 12l. a-year ; and the Master of the Rolls having observed, that it was a legal estate ; and therefore he should make no declaration upon it, the Plaintiffs gave up their claim ; and the bill as to that was dismissed.

1. In Equity, as at Law, a gift to the wife is a gift to the husband ; who, being bound to maintain the wife, is entitled to her property. A Court of Equity will, however, execute a trust for the sole and separate use of the wife, when the intention of the donor to that effect is unequivocally declared ; but a gift to the wife for her use is not held to be a sufficient declaration of such intention : *Wills v. Sayers*, 4 Mad. 411 : and, it has been judicially observed, it is difficult to find any substantial distinction between a gift to a wife for her use, and a gift for her own use. *Roberts v. Spicer*, 5 Mad. 492. The case of *Jones v. —*, (which was cited *arguendo*, in the principal case, and the statement of which, as given in the present report, was relied upon in *Adamson v. Armitage*, 19 Ves. 419,) Mr. Belt, by an examination of the Register's Book, has discovered, was a decision that a separate estate did not pass to the *feme covert*. See the note to *Lee v. Prieux*, 3 Brown, 383, Belt's Edit. But the word "sole" is held to be more emphatic and operative ; a bequest to the sole use of the wife will be tantamount to a bequest for her separate use : *Ex parte Ray*, 1 Mad. 207 : so a legacy to a married woman, "to be at her own disposal," vests in her as separate estate ; *Prichard v. Ames*, 1 Turn. 223 ; and a direction that a legacy shall be paid into the proper hands of a married woman, creates a trust for her separate use. *Hartley v. Hurle*, 5 Ves. 545. In *Darley v. Darley*, according to the report in 3 Atk. 399, it was held, that a devise to the husband for the "livelihood" of the wife, would convert the husband into a trustee for her separate use ; but Lord Alvanley, after an examination of the Register's book, declared the decision and the report of that case to be directly at variance ; the report, of course, is of no authority. *Lee v. Prieux*, 3 Brown, 383. Technical words, however, are not necessary in a deed of settlement, and, *a fortiori*, not in a will, to secure property to a married woman's separate use, where the intent is perfectly unambiguous. *Tyrrell v. Hope*, 2 Atk. 561 ; *Dixon v. Olmius*, 2 Cox, 415.

2. As to the right of a *feme covert*, to a provision out of her equitable interests, as against the assignees of her husband, see the note to *Burdon v. Dean*, 2 Ves. 607.

(1) That this Equity of a married woman prevails against the assignees under a commission of bankruptcy against her husband, see, *ante*, *Burdon v. Dean*, *Orwell v. Probert*, vol. ii. 608, 680 ; *Brown v. Clark*, *Freeman v. Parsley*, iii. 166, 421. As to the husband's assignee for valuable consideration, see *Franco v. Franco*, iv. 515, [*Sadlington v. Kinsman*, 1 Bro. C. C. (Am. ed. 1844,) 51, and cases cited in note (b),] and the authorities there referred to ; and as to the Equity of the wife generally, the note, ii. 609.

MONTGOMERIE v. WOODLEY.

[1800, JULY 25.]

DEVISE of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn: a subsequent direction, that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under twenty-five the accumulation belonged to his personal representative.

CRISP MOLINEAUX by his will first directed all his debts and funeral expenses to be paid. Then, after giving several specific and pecuniary legacies, the latter to be paid within twelve months after his decease, he gave and devised all those his plantations and estates in the island of St. Christopher, and also all such part of his estate as he had power to devise, situate in the parish of Garboldisham, and also all his estate in Black Raven Alley, near London Bridge, and all other his real estates, together with the residue of his personal estate, if any, and all other his estate and effects of what nature or kind soever, not otherwise disposed of by his will, whether in possession, reversion, or expectancy, and of which he had power to dispose, to trustees, their heirs and assigns, for ever; in trust in the first place to pay the several annuities and legacies given out of the produce of such part of his effects, as he had directed the same to be paid, and subject thereto; and also in trust to pay out of the rents of his estate at Garboldisham another annuity: and in farther trust, and to and for the several uses, ends, intents, and purposes, after mentioned: that is to say; as for and concerning such of his estates in Garboldisham aforesaid, as he has power to dispose of, and also his estate in Black Raven Alley, subject as aforesaid, to the use of his eldest grandson Crisp Molineaux Montgomerie and his assigns during his natural life; remainder to trustees to preserve contingent remainders; remainder to the use of his first son lawfully begotten and the heirs male of the body of such first son; remainder to the use of the second, third, fourth, fifth, sixth, and all and every other, sons of Crisp Molineaux Montgomerie, and the several and respective heirs male of all and every such sons; and in case of the death of his said grandson without issue male, or of the death of such issue male under age, and without issue, then to the use of the third son of the body of Elizabeth Molineaux Montgomerie, named Thomas Tomlinson Molineaux Montgomerie for life, and of his first and other sons; the limitations being directed exactly in the same manner as before; with similar remainders to the use of her fourth son George Stephen Molineaux Montgomerie, and all and every her other sons by her present husband, and their several and respective issue male: and in case of the death of Elizabeth Molineaux Montgomerie without issue, or such issue male dying under age and without issue, then to and upon the same uses, limitations and res-

trictions, as are after mentioned respecting his estate in St. Christopher's and the residue of his personal estate.

The testator then gave directions as to all his plantation and estate in St. Christopher's and all other his real estates, together with the residue of his personal estate, if any, and all other his estate and effects of what nature or kind soever, not otherwise disposed of by his will, whether in possession, reversion, or expectancy, of which he had power to dispose, to and upon the several uses, ends, intents, and purposes, following: namely: upon trust in the first place to place out in the 3 per cent. consolidated bank annuities 3000*l.*; provided his personal estate leave sufficient after his debts and legacies: which he directed to be immediately paid off; and if it should not be sufficient, then 500*l.*, until the same with the surplus of his personal estate shall amount to that sum; which was to be applied in discharge of the contingent legacies; the surplus to fall into, and be considered as part of the general residue; and upon farther trust as to his plantation and estate in St. Christopher's aforesaid and all other his real estates and other estate and effects of what nature or kind soever, subject as aforesaid, upon trust and to and for the use of his second grandson William Crisp Molineaux Montgomerie for life; with similar limitations to his first and other sons in tail male; and remainders in strict settlement to Thomas Tomlinson Molineaux Montgomerie, and George Stephen Molineaux Montgomerie, for their lives, and to their first and other sons, successively; remainder to the fifth, sixth, seventh, and every other, son of Elizabeth Molineaux Montgomerie, and the several heirs male of their bodies; with divers remainders over to the sons of his daughter Lady Burnaby and of his other daughters, in strict settlement; and the ultimate remainder to his own right heirs.

The testator then directed, that from and immediately after his decease all and every such person or persons as shall be entitled for his or their life or lives to his said estate in St. Christopher's or any other island in the West Indies, in which he may be seised or possessed of property at the time of his decease by the above limitations, shall, when and as they shall be respectively entitled to the same in possession, take the name and arms of Crisp and Molineaux: in case of neglect or refusal the estate to go to the next person entitled, as if the person so neglecting was dead.

[*524] * By another clause the testator directed, that neither of his grandsons above named, who may be born of the bodies of the aforesaid Elizabeth Molineaux Montgomerie, or of his aforesaid Dame Elizabeth Burnaby, or his daughters Margaret and Catherine, shall take or come into possession of any of his estates, before such grandson or grandsons shall have attained his or their age or ages of twenty-five years; declaring, his will and meaning was, that such grandson or grandsons, who may become entitled to his possessions, as above specified, may before their respective attainments to the age or ages of twenty-one years for their maintenance and education, and after such age or ages of twenty-one years

and until their respective attainments to the age or ages of twenty-five years for their proper support, be allowed such sum or sums out of the rents, issues and profits, of such estates as are respectively devised to them, as his executors and trustees shall in their discretion think necessary and proper.

The testator died in 1792. William Crisp Molineaux Montgomerie died in 1797, an infant and without issue. His father George Molineaux Montgomerie, being the only son and heir at law of the testator, having taken out administration to his deceased son, filed the bill; praying, that it may be declared that the Plaintiff as administrator of his deceased son is entitled to the savings or surplus of the rents and profits of the estate in St. Christopher's and of the interest or produce of the residue of the testator's personal estate, which accrued between the time of the death of the testator and the death of William Crisp Molineaux Montgomerie: or, if not, then that as heir at law of the testator he is entitled to the savings of such rents and profits, and that the Plaintiff and the other next of kin of the testator are entitled to such savings of the personal estate.

The daughters of the testator by their answer submitted, whether any and what part of the interest or produce of the residue of the personal estate, which accrued between the times stated in the bill, was disposed of. Thomas Tomlinson Molineaux Montgomerie, George Stephen Molineaux Montgomerie, and Michael Molineaux Montgomerie, first tenant in tail of the St. Christopher's estate under the will, by their answers submitted, whether the savings of the rents and profits of that estate and the interest and produce of the residue * of the personal estate ought or [* 525] ought not to accumulate for the benefit of such persons as shall become entitled under the remainder in the will.

The *Attorney General*, [Sir John Mitford], Mr. *Mansfield*, and Mr. *Cox*, for the Plaintiff. The legal estate vested in William Crisp Molineaux Montgomerie; and there were no words to divest it. The clause, by which the grandsons are not to have possession before the age of twenty-five, has not the effect of revoking the former disposition. The consequence of that would be, that all the limitations to unborn children must fail; and there would be no disposition of the rents and profits and the income of the personal estate; for there is no direction for accumulation, nor any other disposition whatsoever. The expression in this clause, postponing the possession till the age of twenty-five, can only mean the actual possession. Those words do not properly apply to personal estate. If the testator had any farther intention, something more would be expressed. In the construction of this will the latter part of this clause is very material; where directing the allowance out of the rents and profits "of such estates as are respectively devised to them" he is speaking of an allowance to persons at that time, previously to the age of twenty-five, entitled to his

possessions. Under the former part of the will therefore the Plaintiff is entitled as administrator to his son.

Solicitor General, [Sir William Grant], and Mr. Steele, for the tenant for life and the first tenant in tail, Defendants. The Defendants cannot claim the rents and profits of the real estate: but the produce of the personal estate accrued within this period ought to accumulate, and go to the next taker. When personal estate is given at a future period, and nothing is said of the intermediate profits, they accumulate. That was determined in *Bullock v. Stones* (1) and *Green v. Ekins* (2); which show the distinction between real and personal estate in that respect. According to that rule, if the first tenant for life had attained the age of twenty-five, he would have taken the personal estate with the accumulation; and in consequence of his death under that age the present tenant for life will take it, subject to the said contingency; and so on; till some one becomes entitled to take it absolutely. There are many authorities [* 526] to show, that if *this had been a gift of the residue of the personal estate only, the accumulation should go to the first person, entitled to take any interest in it as the residue. This is a contingent interest to that person, who shall first attain the age of twenty-five.

Mr. Sutton and Mr. Campbell, for some of the next of kin, Defendants. The claim of the next of kin to the interest of the residue, that accumulated previously to the death of William Crisp Molineaux, is, I admit, a difficult point to be sustained (3). But it may be urged, that there is nothing upon this will to distinguish the rents and profits of the real estate from the interest of the personal estate; and there is an intestacy as to both. There is no direction, that they shall accumulate for the person next in remainder under the will. The word "take" applies to the personal estate; and "come into possession" to the real. *Bullock v. Stones* was a bequest of the absolute interest in the residue: this is a partial interest for life only.

The *Attorney General*, [Sir John Mitford], in reply. If this clause has the effect of a revocation, supposing all the grandsons named in the will had died under the age of twenty-five, all the remainders over would be void. The distinction taken in *Nicholls v. Osborn* (4) and *Studholme v. Hodgson* (5) is, whether there is a condition precedent, or not. In *Green v. Ekins* there was no gift until the age of twenty-one.

LORD CHANCELLOR [LOUGHBOROUGH]. There is not much difficulty in the will, when it is read with a little attention; though the

(1) 2 Ves. 521.

(2) 2 Atk. 473; 3 P. Will. 306, n.

(3) A general residuary disposition passes every thing not well disposed of. *Brown v. Higgs*, *Shanley v. Baker*, *Kennel v. Abbott*, *ante*, 501; vol. iv. 708, 732, 802. See the note, 716. [See *Bolger v. Mackell*, *ante*, 513, and note.]

(4) 2 P. Will. 419.

(5) 3 P. Will. 300.

phraseology of that clause is a little singular : but it is difficult even upon the words of that clause by any fair construction to make out, that he had an intention for an intestacy. There is an estate for life, and as to the freehold estate it is an estate for life in possession ; and if any act was to be done with regard to the freehold estate, it must be under the title of the devisee. You could not lay an ejectment except under the title of the first tenant for life ; for he has the freehold estate undoubtedly. The testator has used a little inaccurately words of restriction as to his grand-children in this clause. He could not mean, it would be repugnant to the whole will, that * they should not take the estate : but he means, that [* 527] they shall not take it so as to come into the actual possession ; and he carries on that restriction as to the actual possession, the receipt and management, to the age of twenty-five. He does not dispose of the rents and profits, and the interest of the personal estate in the mean time. It is a strange construction to say, these estates are revoked. All the limitations to the unborn sons would be void. I rather conjecture, his idea was governed by this ; that what he thought of was the estate at St. Christopher's, a West India estate : which he probably thought required a very considerable management ; and he meant to postpone the actual possession, till the devisee should be fit for the management. I observe, an eminent West India merchant is one of the trustees. In *Bullock v. Stones* the devisee took the personal estate absolutely at twenty-one : in this case the devisee takes the personal estate for life only. The accumulation would be for the person first entitled to the capital. Therefore the second tenant for life has no interest in the accumulation different from that of the first tenant for life.

Declare, that the rents and profits of the real estate and the interest and produce of the personal estate accrued during the life of William Crisp Molineaux Montgomerie, beyond what was allowed for his maintenance, belong to the Plaintiff.

THAT a Court of Equity always avoids, if possible, putting such a construction upon a will as would lead to an intestacy, see, *ante*, note 3 to *Maberley v. Stode*, 3 V. 450.

OSBORN v. BROWN.

[1800, JULY 26.]

THE testator bequeathed a legacy to his daughter to be paid within twelve months after his decease; but if she should marry A. then he revoked the legacy. She remained unmarried till about fourteen months after the testator's death; and then married A. They obtained a decree for the legacy. (a)

WILLIAM BROWN by his will, dated the 18th April, 1795, gave among others the following legacy :

"I give to my daughter Mary the sum of 400*l.* of lawful money of Great Britain to be paid to her by my executors within twelve months after my decease : but if my said daughter Mary shall marry John Osborn now or late of East Burnham in the said county of Bucks labourer, then and in that case I do hereby revoke and make void the said legacy of 400*l.* to my said daughter Mary, and in lieu thereof I give to her the sum of 1*s.* and no more."

All the rest, residue, and remainder, of his personal estate not therein before by him disposed of, after payment of his [* 528] debts, funeral * and testamentary expenses, and the legacies therein before by him given, he gave and bequeathed unto and among his sons John and Henry and his daughters Sarah, Elizabeth, and Mary, equally to be divided between them share and share alike, in and by equal shares and proportions.

The testator died on the 22d of April, 1795. His daughter Mary remained unmarried about fourteen months after his death; and then married John Osborn. The executor refusing to pay her legacy of 400*l.*, she and her husband filed the bill.

(1) Mr. Piggott, for the Plaintiffs.

Mr. Sutton and Mr. Hall, for the Defendant. In the event of the marriage of the Plaintiffs, the legacy is expressly revoked and made void. To this proposition there is no limitation of time. If at any time of the legatee's life she marries this person, the legacy is revoked. The Plaintiffs now resort to this Court to obtain payment of this legacy in direct opposition to the testator's declared intention. Can the Court possibly aid such a claim? Perhaps no case in circumstances applies precisely to this: but the principles laid down in *Scott v. Tyler* (2) certainly do.

Mr. Piggott in reply. The terms, in which this legacy is given, are those, which are always held to make a legacy vested. The interest is absolute not limited. It is the strict and literal case of *debitum in presenti solvendum in futuro* (3): but, while the payment

(a) See 2 Williams, Executors, (2d Am. ed.) 917, 918; *Stackpole v. Beaumont*, ante, 3 V. 89, note (a); 1 Story, Eq. Jur. § 281, *et seq.*

(1) The arguments and judgment *ex relatione*.

(2) 2 Bro. C. C. 431. For the present doctrine of the Court upon conditions in restraint of marriage, see also *Stackpole v. Beaumont* and *Pearce v. Loman*, ante, vol. iii. 89, 135, and the note, 98.

(3) As to this distinction of the Civil Law, adopted in this country as to personal

is suspended, the legacy is liable to be defeated. The event upon which it was revoked, must therefore happen within that time, namely, twelve months after the testator's death. This implication is irresistible, from the direction to pay the legacy within that time. No express words could make the intention more plain. The testator could not intend, that the legacy should be paid a year after his decease, and be revoked by a marriage fifty years afterwards. He might intend, as far as he could, to prevent a rash or precipitate marriage, and yet not expect the sacrifice of a fixed and lasting attachment. He has not attempted a restraint indefinite

* as to time, but limited. This legacy is given over. *Scott* [* 529] v. *Tyler* was the case of a condition precedent to the vesting of the legacy; and is therefore totally different. This legatee was entitled to be paid at the end of twelve months after the testator's decease: or, if not entitled to payment then, merely because she had not then quite attained the age of twenty-one, she had a right to have her legacy appropriated and laid out for her benefit.

LORD CHANCELLOR [LOUGHBOROUGH]. She certainly had. The case cited has no analogy to this. This is not the case of a condition precedent. In this case I can only refer the event, in which the legacy was to be revoked, to the time, during which, the payment was suspended. That results from the manner, in which the legacy is given, and the time, at which the payment of it is directed. If the legatee had come unmarried at the expiration of a year, what objection could have been made? Her subsequent marriage cannot in this case alter her right (1).

As the Defendant has admitted assets I must decree payment of this legacy with interest.

It has been repeatedly decided, both previously and subsequently to the principal case, that where a certain period is appointed for the payment of a legacy, a breach, after that fixed time has elapsed, even of an express condition annexed to the legacy, will not affect the right to receive it. *Clent v. Bridges*, Rep. temp. Finch, 27; *Brydges v. Wotton*, 1 Ves. & Bea. 134. As to the general doctrine with respect to conditions in restraint of marriage, and the distinction between precedent and subsequent conditions, see, *ante*, notes 2 and 3 to *Stackpole v. Begumont*, 3 V. 89.

legacies, but not as to land, and the excepted cases, see *Bolger v. Mackell*, *ante*, 509.

(1) *Brydges v. Wotton*, 1 Ves. & Bea. 134.

DEVISME v. MELLISH.

[1800, JULY 26.]

LEGACY for a mourning ring to each of the testator's relations by blood or marriage, confined to the Statute of Distributions, and those, who have married persons entitled under it. (a)

THE testator bequeathed 50*l.* for a mourning ring to each of his relations by blood or marriage. The question was what relations were entitled.

Mr. *Mansfield* and Mr. *Romilly*, for the Plaintiffs said, it must be confined, as such dispositions often have been, to the Statute of Distributions (1), and those, who have married persons entitled under that Statute.

LORD CHANCELLOR, [LOUGHBOROUGH], said, he had no difficulty in taking that line; though he was not sure, he hit the intention by it.

The decree was made accordingly.

SEE, *ante*, note 5 to *Brown v. Higgs*, 4 V. 708.

(a) 2 *Williams*, Executors, (2d Am. ed.) 812, 813; *Green v. Howard*, 1 Bro. C. C. (Am. ed. 1844,) 31, and notes; *Rayner v. Mowbray*, 3 ib. 234; *Phillips v. Garth*, ib. 69, note (b), and cases cited; *Masters v. Hooper*, 4 ib. 207; *McNeilledge v. Galbraith*, 8 Serg. & R. 43; *McNeilledge v. Barclay*, 11 Serg. & R. 103; *Grant v. Lyman*, 4 Russ. 92; 4 Kent, (5th ed.) 537, note; *Wright v. Alkyns*, 1 Turn. & Russ. 143; *Wright v. Trustees Method. Epis. Church*, 1 Hoff. Ch. 213; Lond. Law Mag. Aug. 1835, art. 5; *M'Cullough v. Lee*, 7 Ohio, 15.

(1) 22 and 23 Char. II. c. 10. See the references, 3 Swanst. 319; *post*, vol. ix. 323; *Crewys v. Colman*, *Pope v. Whitcombe*, 3 Mer. 689.

CARTWRIGHT v. VAWDRY.

[1800, JULY 30.]

AN illegitimate child not entitled to share under a devise to children, generally; (a) notwithstanding a strong implication upon the will in favor of that child. Illegitimate children, having acquired that character by reputation, may take under a will, as by necessary implication intended and described, (b) [p. 534, note.] Whether marriage of a widower with the sister of his deceased wife, in England voidable, in Scotland is void, *quære*, [p. 534, note.] Bequest to the children of A. described spinster, and nothing on the face of the will showing that illegitimate children were intended: inquiry, whether she left illegitimate children, refused, [p. 534, note.]

THOMAS CARTWRIGHT by his will, dated the 30th of June, 1794, reciting, that his wife was already provided for by settlement, gave her some additional benefits during her widowhood. Then, after giving legacies to his executors for their trouble, he gave them all the rest, residue, and remainder, of his estates real and personal whatsoever and wheresoever, upon trust to receive the rents, issues, and profits, and to get in all money due to him, and invest it in the funds upon trust to apply a reasonable part of the said rents, sums of money, and interest, upon the maintenance and education of all and every such child or children as he might happen to have at his death, equally, share and share alike, until such (1) of them should respectively attain their age of twenty-one years or day or days of marriage; then upon trust to pay such child or children, which should so become of age or married, one fourth part of the whole income of his estates both real and personal; and in case there should be only one such child, which should attain that age or marriage, as aforesaid, then in trust to pay the whole income of all his estate, both real and

(a) Where there are legitimate children to answer the description of "children," the rule of law is that legitimate children only will take. *Bagley v. Mollard*, 1 Russ. & My. 581; *Fraser v. Pigott*, 1 Young, 354; 2 Williams, Executors, (2d Am. ed.) 803; *Shearman v. Angel*, 1 Bai. Eq. 351; *Wilkinson v. Adam*, 12 Price, 470; *Gardner v. Heyer*, 2 Paige, 11; Ram on Wills, ch. 6, p. 50, 51.

But natural children may take under this description, if the will itself manifests an intent to include them in the term "children," either by express designation, or by necessary implication. *Wilkinson v. Adam*, 1 Ves. & Bea. 462; S. C. 12 Price, 470.

The proof of the intent to include natural children in the term "children" must come from the will only; extrinsic evidence being inadmissible to raise a construction by circumstances, except for the purpose of showing that illegitimate children have at the date of the instrument acquired the reputation of the children of the testator or the person named in the instrument. *Wilkinson v. Adam*, 1 Ves. & Bea. 422; *Swaime v. Kennerly*, ib. 469; *Gardner v. Heyer*, 2 Paige, 11; *Collins v. Hozie*, 9 Paige, 88; *Shearman v. Angel*, 1 Bai. Eq. 351. See also *Harris v. Lloyd*, 1 Turn. & Russ. 310; *Mortimer v. West*, 4 Russ. 370; 2 Williams, Executors, (2d ed.) 804, 805; 4 Kent, (5th ed.) 413, 414; *Cooley v. Dewey*, 4 Pick. 93; *Brewer v. Blaugher*, 14 Peters, 178; *Heath v. White*, 5 Conn. 228.

An illegitimate child may take by particular description before its birth. *Dawson v. Dawson*, Madd. & Geld. 292; *Evans v. Massey*, 8 Price, 22; *Gordon v. Gordon*, 1 Meriv. 141; 2 Williams, Executors, (2d Am. ed.) 805, 806.

(b) 2 Williams, Executors, (2d Am. ed.) 802-805.

(1) This is probably an error of the press; and should be "each."

personal, to such only child, if all his other children should have died without issue ; and in case any or either of the said children should happen to die, before she or they respectively attain her or their age of twenty-one years, or day or days of marriage respectively, or without issue, then the parts or shares of her or them so dying under age, unmarried, or without issue, should go to and among, and be in trust for, the surviving child or children, to be equally divided among them, share and share alike, if more than one, and be payable, when and as her or their original parts or shares should by virtue of that his will become payable, and be liable to the same contingencies of surviving to and among the surviving child or children in case of the death of any of the said children in manner aforesaid, as he had therein before directed concerning her or their original shares or parts ; and when his youngest child living should have attained the full age of twenty-five years, then he directed all his real estates to be valued and divided into as many equal shares as he should have children then living ; or if any of them should happen to be then dead leaving issue, such share of his deceased child or children to be sold ; and the money arising from the sale, [* 531] together with the proportional * part of his personal estate as the original share of his deceased child or children to be vested in the public funds ; in trust that the interest be divided among his said grand-children, the issue of such his deceased child or children, until the youngest attain his or her age of twenty-one years or day of marriage, which should first happen ; and at such time to be transferred to them equally, share and share alike ; and in case all or any of his daughters should happen to marry, and not having any child or children of such marriage should happen to die, then it was his will, that the surviving husband should receive the income arising from his deceased daughter's share during his own life, not committing waste ; and, when such division was made out, it was his will, that his eldest child then living should have the first choice of her share, and so of the rest according to their seniority ; and she or they to have and to hold such share and shares of his real estates, lands, and premises, for and during the term of her and their natural life and lives, and to their issue and the survivor of them for ever.

The will then directed the executors to divide all the testator's personal estate into as many equal shares as he should have children then living, and to transfer or make over to her or them or the issue of her or them, all such share and shares for her and their respective use and benefit, at the same time when his youngest child then living should attain the age of twenty-one or day of marriage : but in case all his said children should die, before they attained their age or ages or day or days of marriage respectively and without issue, then and in such case, he directed, that his executors should stand possessed of his estates real and personal, and the dividends, interest, and produce thereof, on trust to pay the growing rents of his real estate and the interest of his personal estate to his wife during her life and her

remaining his widow ; and after her death or marriage, and in case of all his children dying, as aforesaid, respectively under age, unmarried, and without issue, then he gave and bequeathed all his estates real and personal to his next of kindred and heirs at law, and their heirs and assigns for ever ; and he devised the guardianship and education of all his said children during their minorities, as aforesaid, unto his said wife and his executors : the guardianship of his wife to cease upon her marriage : provided always, that as soon as any of his daughters should happen to marry a person to the approbation of * his executors, who would take the [* 532] name of Cartwright, and live at his house at Oldfield Green, he directed his wife to resign the house to them ; and he directed his executors to pay to his daughter's husband, when he had taken the name of Cartwright, 700*l.* over and above the common proportional share of his other children. He farther directed, that all his family plate, watches, and rings, should be valued, and divided into as many equal parts as he should have children ; and the first child that should come of age or be married, to have the choice of their share, and such share given to them immediately.

The testator died on the 4th of July, 1794 ; leaving his wife surviving and four daughters by her ; Mary, Elizabeth, Ellen, and Judith, and no sons. The eldest daughter Mary was born before the marriage of her parents : the other three were born afterwards.

The bill was filed upon the 3d of March, 1800, by the eldest daughter Mary ; claiming to share with the other daughters under the will upon the intention of the testator. The following circumstances, under which this claim was made, were admitted, and proved by the depositions of the widow, the Defendant Vawdry, who was one of the trustees and executors, and other witnesses.

Elizabeth Cartwright was born upon the 29th of May, 1776 : Ellen, upon the 22d of March, 1780, and Judith, upon the 25th of November, 1783 : since which time the testator and his wife had no other child. They had one son born in 1774 ; who died in May, 1786. The testator and his wife were engaged to each other before the birth of Mary. Mrs. Cartwright before her marriage lived in the testator's house at Oldfield Green in the parish of Astbury, Cheshire. In January, 1770, they went to London ; and lodged in Clerkenwell ; and the Plaintiff was born at such lodgings upon the 14th of March, 1770. They were married at the parish church of Clerkenwell in February following ; and Mary was baptized in the same church on the 1st of July in the same year ; and registered as their legitimate daughter. Immediately afterwards they returned to Cheshire. The testator never divulged the circumstances of his daughter's birth to her, nor to any one else, except the Defendant Vawdry, in confidence ; always endeavoring to keep the * affair secret ; and treating and introducing her as his [* 533] legitimate daughter. He caused the registry of her birth and baptism to be made in the parish church of Astbury ; stating her birth to have taken place in Clerkenwell upon the 1st of July,

1771. In the same page was the registry of the baptism of the son John, made at the same time.

The depositions of Vawdry also stated, that the Plaintiff and her sisters were totally ignorant of the Plaintiff's illegitimacy till after the testator's death; when she questioned the deponent with regard to her father's affairs; thinking she had not received what she was entitled to; upon which the deponent told her the circumstance. A few days previous to the death of the testator, he produced his will to the deponent; desiring him to read it. The deponent said, he was fearful, it was not worded strong enough to provide for the Plaintiff; upon which the testator desired him to come again in a few days; and he would get the will altered, so as to have it properly worded to make the property safe to her; and he mentioned his intention to send for a proper person for that purpose. The deponent went on the day of the testator's death, for the purpose of being present at the alteration of his will: but the testator died a few hours before he arrived. The deponent has no doubt, the testator meant to provide for the Plaintiff as amply as for his other children.

The Defendant, the widow of the testator, being also examined as a witness, stated that the Plaintiff was always considered and treated as legitimate; and that the testator at several periods said to her, "My child, I will take care of you."

The Defendant Elizabeth Cartwright by her answer expressed her consent, that the Plaintiff should share equally with her and her other sisters; and it was stated in the evidence, that the other two daughters had the same disposition: but they were infants.

Mr. *Richards* and Mr. *Evans*, for the Plaintiff. Upon this will it is plain, the Plaintiff was in the contemplation of the testator to be considered a lawful child. The distribution in fourth parts points out distinctly, that she was in his contemplation one of his four daughters. That must have some allusion to four children.

[* 534] *Every expression applies to females. That shows, he meant existing daughters, not future issue, that might be either male or female.

As to the parol declarations relating to the will itself, it is doubtful, I admit, whether that evidence is admissible. But this is a case of latent ambiguity; and the same thing may be done as in *Thomas v. Thomas*. (1)

Mr. *Stanley* for the Defendants, expressed the disposition of the daughters in favor of the Plaintiff.

LORD CHANCELLOR [LOUGHBOROUGH]. This is a very unfortunate case. I have no doubt of the intention: but how can I possibly put upon the will the construction the Plaintiff desires, when there are lawful children? The family will act very honorably and conscientiously by giving way to the disposition, which is stated: but it is impossible in a court of justice to hold, that an illegitimate child

(1) 6 Term Rep. B. R. 671. See, *ante*, vol. i. 257, *Baugh v. Read*; *Parsons v. Parsons*, 266, and the note, 267; *Abbott v. Massie*, iii. 148; *Price v. Page*, iv. 680.

can take equally with lawful children, upon a devise to children. Mr. Vawdry's evidence increases the regret. When the testator placed that confidence in him, it was very wrong not to follow his advice. If he had named this daughter, it would have done. (1)

(1) See, *ante*, the note, vol. iii. 12; *post*, *Godfrey v. Davies*, vi. 43; vii. 489; *Earle v. Wilson*, xvii. 523; xviii. 147, 8; *Arnold v. Preston*, xviii. 288; *Wilkinson v. Adam*, *Swayne v. Kennerley*, 1 Ves. & Bea. 422, 469; *Gordon v. Gordon*, 1 Mer. 141.

Snelham v. Bailey.—In CHANCERY, Michaelmas Term, 1822, 1 Sim. & Stu. 78.

John Snelham by his will reciting, that he had lately married Jane Whiteside, the sister of his late deceased wife Mary Snelham, in Scotland, according to the form and usage of the church there, gave and devised all his messuages, lands, &c. in Manchester and elsewhere in Great Britain "unto my said wife Jane for and during the term of her natural life;" and after her decease he devised the same to trustees upon trust to sell; and he gave and bequeathed "unto my said wife Jane" all the household goods, plate, linen, &c. which he should have at the time of his decease; and he gave all the residue of his personal estate to the same trustees, upon trust to pay the interest and proceeds thereof "unto my said wife Jane for and during the term of her natural life;" and from and after her decease he directed them to call in the principal, and to pay and apply the same, and also the moneys to arise from the sale of his real estate "after the death of the said Jane unto and amongst all and every the child and children begotten and to be begotten by me upon the body of the said Jane equally to be divided between or amongst them, if more than one, share and share alike, and if there shall be but one such child then to such child only, for and towards his, her or their portion and portions" to be paid "to such children or child" at the age of twenty-one or marriage; unless such times of payment shall happen in the life-time "of my said wife;" and in such case the parts or shares of such of them as shall attain twenty-one or be married in the life-time "of my said wife Jane" shall become a vested interest, and be transmissible to his, her, or their executors, &c.; and shall be paid immediately after the decease "of my said wife Jane; and if any such children or child" shall die under twenty-one and unmarried, then the shares of him, her, or them, so dying shall go and be paid to the survivor of them and the executors, &c. "of such of the deceased children" as shall have lived to attain twenty-one, or be married, at such times as their original shares shall become payable; and upon farther trust in the mean time "after the decease of my said wife" to apply the dividends, increase, and produce, for the maintenance and education "of such children or child" until their respective shares shall become payable; and he declared his will, "that my said wife Jane and her children shall take the *provision herein before made for them in the same manner as if the [*534 a] said Jane had been married to me according to the usage of the church of England, and such marriage had been valid according to the laws of England; and in case all and every the child and children by me begotten or to be begotten on the body of my said wife Jane" shall die under twenty-one and unmarried, then he gave one moiety of the last-mentioned trust-moneys "unto my said wife Jane," her executors, &c. and the other moiety to his sister and her children; and he appointed the trustees "and the said Jane my wife" executors.

At the date of the will the testator had issue by Jane, described in the will as his wife; and they had no child afterwards. Under a bill for the execution of the trusts of the will the questions were, 1st, whether the marriage was valid; 2dly, if invalid, whether the children being illegitimate, should take under the description in the will.

1822, Nov. 26.—The VICE CHANCELLOR. It was objected at the hearing, that the marriage in Scotland of a man to the sister of his deceased wife is not a valid marriage. By the law of England such a marriage is voidable, not void; and it is valid, therefore, until sentence is pronounced against it. In consequence it was argued, that, if Jane was never the lawful wife of the testator, her children could not take the provision intended by the will; as the law does not permit a man to make a general gift to future illegitimate children. I at first intended to direct an inquiry as to the validity of the marriage; but it was urged, that such an in-

Upon the proposal of the Plaintiff's Counsel, as the youngest daughter did not want more than three years of the age of twenty-one, the cause was ordered to stand over. (1)

THAT legitimate and illegitimate children cannot both take under the same description, see, *ante*, note 3 to *Standen v. Standen*, 2 V. 589; but that an inaccurate description, unnecessarily superadded, will not vitiate a devise to objects otherwise sufficiently designated, see note 3 to *Parsons v. Parsons*, 1 V. 266.

(1) A liberal maintenance allowed in a case of this nature. *Bradshaw v. Bradshaw*, 1 Jac. & Walk. 647.

quity must necessarily be attended with considerable delay and perhaps expense; and that it ought to be avoided, unless it was absolutely essential for the purpose of the cause. In order to show, that it was not essential, Counsel contended, that, though the proposition cannot be disputed, that a gift generally to illegitimate children is not valid, yet the gift in this will is conveyed in terms, which intended to give the benefit of it to the children of Jane, though she should turn out not to be his lawful wife. I was much struck with the language of the will; and was not sure, that I could bring the case within the reach of any, that had been decided; and I desired it to stand over, until I had considered that point. After examining the case with very great attention I am glad to say, that I am of opinion it comes within the principle of former decisions; and the children would [*534 b] take under the will, *even though it should unfortunately turn out, that by the law of Scotland they were illegitimate. I say, I am glad that I have formed this opinion; as it is always gratifying to a Court of Justice to come to a conclusion, by which provisions, that are founded upon the best feelings of the human heart, can be established. The case of *Wilkinson v. Adam*, that received a more deliberate consideration than perhaps any other case ever before received, has cleared the present case of many of its difficulties; and settled the law upon the point in question. In the former the disposition of the testator was expressed in the following terms: "To the children which I may have by the aforesaid Ann Lewis and living at my decease, or born within six months after." The testator was a married man; and Ann Lewis was not his wife. His intention therefore obviously was to provide for his illegitimate children. It was contended, that this was a general gift in favor of illegitimate children; and, as such, was not valid. The answer was, that though the policy of the law does not permit a man to make a general gift to illegitimate children, it does permit him to make what provision he thinks fit for persons living at the time of making his will, and whom he may believe to be his illegitimate children; and it was said, that in the case then before the Court the testator had not made the illegitimacy of the children the condition of the gift, but used it only as a description of persons. He gave to A., B., and C. whom he considered to be his illegitimate children. It was a gift to persons known in the world by that description. It was admitted, that the gift was not good with regard to any children, who might be born after the testator's death; as that was against the policy of the law. The Court proceeded upon this distinction; and established the validity of the gift. The question in this case is, whether the reasoning is not stronger in favor of the children than it was in the case I have referred to. All the children, whom the testator happened to have by Jane, were born at the time he made his will. It is admitted, that no child, born after his death, could take under the will, if the children should prove to be illegitimate. My opinion therefore is, that it is unnecessary to institute an inquiry into the validity of the marriage according to the Scotch law; as, admitting for the sake of argument, that the marriage was not valid, still the testator has made an express gift to children, who had acquired the reputation of being his; [*534 c] and their illegitimacy is not made the condition of the gift, *but is merely a description of persons. Take a decree, that the mother is entitled to an estate for life with remainder to her children.

Mr. Beames has kindly supplied the following case, in which he was Counsel:

Osmond v. Tindall.—In CHANCERY, August 10th, 1825.

William Gray by his will gave unto his executors all his estate real and per-

sonal, in trust to be disposed of as follows: and he gave unto his "sisters Elizabeth Tindall and Frances Gray, spinster, the sum of 2000*l.* sterling between them;" and, if the said Frances Gray should not be living at the time of his decease, he directed, that her 1000*l.* part of the said 2000*l.*, should sink into the residue; (after several pecuniary legacies) all the rest, residue, and remainder of his estate, &c. he gave and bequeathed unto and between the said Elizabeth Tindall and Frances Gray; "and in case the said Elizabeth Tindall and Frances Gray, or either of them should happen to die before my decease, then, her or their share or shares of the residue to go to the child or children of them the said Elizabeth Tindall or Frances Gray, or each or both of them so dying, to be paid to such child or children of the said Elizabeth Tindall and Frances Gray or either or both of them upon their attaining the age of 21 years or being married," &c.

Frances Gray died in the testator's life time, unmarried; leaving illegitimate children, one of whom married Osmond, one of the testator's executors; who filed the bill against Elizabeth Tindall and Ann Holmes, the testator's sisters and sole next of kin, and all the illegitimate children of Frances Gray, including the Plaintiff's wife, praying that it might be ascertained, who were entitled to the residue.

The Lord Chancellor decreed, that so much of the decree of May, 1820, as directed the Master to inquire, whether Frances Gray left any and what illegitimate children, should be reversed; and that the bill should be dismissed against the Defendants (*the illegitimate children*) on the authority of *Wilkinson v. Adam*; nothing appearing on the face of the will, from which the Court could collect, that by the term "*children*" illegitimate children were intended.

The note states, as facts in this case, that Mrs. Tindall was a widow having lawful issue; and that the testator knew, that Frances Gray had illegitimate children.

The decision in *Beachcroft v. Beachcroft*, 1 Madd. 430, that illegitimate children could take under the description of "*children*," simply, is in opposition to all the authorities, and particularly the case of *Wilkinson v. Adam*. The only instance of a similar construction is *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419, where a legacy to "the children of the late Charles Ker," who should be living at the testator's decease, was given to illegitimate children. The fact, that there was no legitimate child of Charles Ker at the testator's death, was ascertained by the necessity of inquiring for the legatees; that there could be none in future, was collected by necessary implication; or rather was apparent upon the will: but, that there never had been a legitimate child, could be obtained only by evidence; the object and effect of which were to show, that illegitimate children were intended: a purpose, for which evidence cannot be received. It is admitted only to show, that certain persons have acquired the reputation of being the children of the reputed father; the description of such illegitimate children, as the objects, being collected by necessary implication from the will itself; as defined by Lord Eldon, "so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." In neither of those cases does the will afford any such implication, or any implication that illegitimate children were the objects. If in *Beachcroft v. Beachcroft* the testator had married, and left legitimate children, or in *Lord Woodhouselee v. Dalrymple* the result of the inquiry had been, that legitimate children of Charles Ker were living at the date of the will, could illegitimate children possibly have taken? In the case of latent ambiguity (see *Parsons v. Parsons*, *ante*, vol. i. 266,) the description has some application, imperfect from some extrinsic circumstance, introduced by parol evidence; and therefore evidence is admitted to supply the deficiency, and by clearing the ambiguity to complete the title; but the mere want, the non-existence, of the legatee described in appropriate and unequivocal terms, cannot authorize the admission of evidence to create another, who does not answer the description.

BUTLER v. BUTLER.

[ROLLS.—1800, JULY 30.]

UPON the purchase of an equity of redemption the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. (a)

By indentures of lease and release, dated the 25th and 26th of January, 1782, between Edward Brent of the first part, George Butler of the second part, George Richards of the third part, and Stephen Hall of the fourth part, reciting indentures of mortgage, dated the 24th of June, 1772, whereby a wharf and other [* 535] *premises were assigned to Maurice Bernard for the residue of a term of ninety-nine years, to secure the sum of 2000*l.* and interest, subject to redemption, by Edward Brent and Nathaniel Brent, since deceased; and that by another indenture, dated the 25th of the same month, the premises were assigned by Edward and Nathaniel Brent to George Butler for securing to him 1000*l.* and interest; and that the freehold was become vested in Richards in trust for Nathaniel Brent and his heirs; and that the said two sums and a considerable arrear of interest were due; which were more than the fee simple was worth; and that George Butler agreed to accept the same in full of all moneys due to him from Edward Brent by virtue of the said mortgage or otherwise; and had agreed to take upon him the payment of the said principal sum of 2000*l.* and interest then due and owing to Maurice Bernard upon his, George Butler's, having an absolute release and assurance of the fee-simple and inheritance of the premises; it was witnessed, that in pursuance and performance of the said agreement, and in consideration of the said sum of 2000*l.*, therein mentioned to be so due and owing to the said Maurice Bernard, and the interest thereof, which the said George Butler did thereby agree to pay and discharge, and of the said sum of 1000*l.* and interest so due to Butler, and which was thereby declared to be considered as the purchase of

(a) The same is true although the purchaser has paid off part of the incumbrance; and although the purchaser has even rendered himself liable at law, to the mortgagee or creditor for the payment of the mortgage debt, this circumstance will not be sufficient to change the natural course of *assets*; there must in addition to all this, be proof of strong and decided intention to subject the personal estate to the charge; as by an express direction in the will of the purchaser, or by disposition, or by language equivalent to an express direction. *Cumberland v. Codrington*, 3 Johns. Ch. 229, where will be found a thorough and masterly argument on this subject. See also *McLearn v. McLellan*, 10 Peters, 625; 2 Story, Eq. Jur. § 1248; *Billinghurst v. Walker*, 2 Bro. C. C. (Am. ed. 1844,) 604, note (1), 608, 609, notes; Fonbl. Eq. b. 3, ch. 2, § 1, note (b); *Keyze's case*, 9 Serg. & R. 73; *Tweedell v. Tweedell*, 2 Bro. C. C. (Am. ed. 1844,) 101, 108, and notes; *S. C.* ib. 154, note; *Ancaster v. Mayer*, 1 ib. 454, 467, notes (a), and (b); *Ram on Assets*, ch. 29, § 1, p. 357, *et seq.*; 1 Story, Eq. Jur. § 576; 4 Kent, (5th ed.) 420; 2 Williams, Executors, (2d Am. ed.) 1207, *et seq.*; *Graves v. Hicks*, 6 Sim. 398; *Hamilton v. Worley*, 4 Bro. C. C. 199; *S. C. ante*, 2 V. 62, note (a). See *Gibson v. McCormick*, 10 Gill & John. 66.

the fee-simple and inheritance of the premises, and in consideration of 10s. paid to Edward Brent and George Richards, he Edward Brent did direct, limit, and appoint, and Richards did bargain, sell, alien and release, to George Butler and Stephen Hall and their heirs the premises, to hold to them and their heirs to the use of Butler and Hall and the heirs of Hall, nevertheless, as to the estate of Hall, in trust for Butler, his heirs and assigns for ever.

After the execution of the indentures of June 1772, Bernard signed a declaration of trust to George Butler, declaring, that the sum of 300*l.* of the 2000*l.*, therein mentioned, was the money of Butler, and 1700*l.* only was advanced by Bernard.

In May 1783, George Butler died, seised of the premises, subject to the said debt of 1700*l.* then remaining due to Bernard. By his will, dated the 23d of May, 1783, he directed, that all his just debts and funeral charges should be paid out of his personal estate and effects; and he gave to Robert Burrow and John Evans and *their heirs, among other estates, the wharf [*536] and estate he then lately purchased of Mr. Brent, to the use of his eldest son George Butler for life; remainder to the heirs of his body; with remainders over. He gave other freehold estates to the use of his son Thomas Butler for life; remainder to trustees to preserve contingent remainders; remainder to the use of the heirs of his body; and he gave all his leasehold estate and all his personal estate, after payment of his debts, as aforesaid, and legacies, to his executors; in trust to sell the leasehold, and after payment of his debts, legacies, and funeral charges, in moieties to his two sons.

George Butler the younger was the acting executor of his father. In 1789 the bill was filed by Thomas Butler to have the will established; and the usual decree was made. Upon the accounts the personal estate of George Butler the elder appeared to be charged with the payment by the executor of 2247*l.* 14*s.* 10*d.* to Bernard in discharge of the 1700*l.* and interest. The Plaintiff claimed one moiety of that sum, to be reimbursed out of the personal estate of George Butler the younger; who was also dead.

The Master's report stating, that the payments in discharge of the debt due to Bernard were properly made out of the personal estate of George Butler the elder, and disallowing the Plaintiff's claim in that respect against the personal estate of the executor, an exception to the Report was taken by the Plaintiff on the ground, that the testator George Butler the elder had not made the debt his own; and it remained a charge upon the estate.

Mr. Lloyd and Mr. King, in support of the exception. This is exactly the case of *Tweddell v. Tweddell* (1); clearly nothing more than the purchase of the equity of redemption of an estate, with a mortgage upon it; not so strong as many other cases, and particu-

(1) 2 Bro. C. C. 101, 152. See the principal cases upon this point collected and arranged in Mr. Cox's note, 2 P. Will. 664, to *Evelyn v. Evelyn*; ante, *Woods v. Huntingford*, vol. iii. 128; *Hamilton v. Worley*, ii. 62; and the note, i. 187.

larly that one. The question is, whether George Butler the elder has made any alteration by his will. He has done nothing more than charging his personal estate with the payment of his debts generally. In *Tweddell v. Tweddell* the charge for payment of debts was much stronger; but had no weight; for Lord Thurlow upon great consideration thought, it was not the debt of the testator. [* 537] * So this was no debt of Mr. Butler's. Upon the conveyance of the equity of redemption to him there was no communication with Bernard the mortgagee. The executor of Butler therefore, was never liable to pay the money to him. As to its being a contract of indemnity, in *Tweddell v. Tweddell* and many other cases there was a positive covenant: but that was held not to have the effect of making any alteration in the original debt. In this case Bernard being no party, it was nothing more than a mere transfer of the equity of redemption.

The principles of all these cases are laid down in *Woods v. Huntingford* (2); and it is unnecessary to go farther back. The circumstance there relied on, no communication with the mortgagee, occurs in this case. The circumstances, which in that case determined it to be the debt of the party, were the new mortgage, and the security given to the mortgagee upon a farther sum borrowed. This is the weakest case, that has occurred; merely taking the equity of redemption, subject to a mortgage, without any communication with the mortgagee or any security to him. The devisee must therefore take the estate *cum onere*. The debt originated with Brent: it was not the debt of Butler; and it remained in the same situation at his death; never acted upon except by that agreement for indemnity; and Brent was never called upon by the mortgagee.

Mr. *Richards* and Mr. *Bevan*, for the Report. This is in common sense an agreement with Brent to give him for this estate the money Brent owed Butler and so much more as was due to Bernard. Suppose, Bernard had not been mortgagee. It is true, Butler did not make himself personally liable to Bernard: but it is also true, that it was a debt due from him in respect of the estate to Bernard: who could have foreclosed him. In all sense and equity it is a debt due from Butler to Bernard; though the latter could not have sued Butler personally. It is directly a debt at law; and how can equity say, it is not to be paid out of the personal estate, instead of being thrown upon the real estate? Can the reason be, that an action did not accrue; when if Brent had been damnified, he would have had an action against Butler? It is not like the case of an [* 387] estate descending, subject to an incumbrance; * where it was never the debt of the party; for this is substantially his debt: he buys the estate; and agrees to pay the purchase money. Though in this instance the mortgagee has no right to an action, it is in substance the same; and the only defect is in form; that such an action could not be brought: but it is a substantial debt incurred

by the vendee. The executor has only done that without expense, which by circuity he might have been compelled to do.

Mr. Lloyd in reply, was stopped by the Court.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am afraid, I must decide with the Plaintiff; for I cannot distinguish this case from *Tweddell v. Tweddell*. If that case and the others, upon which it was determined, were out of the way, and I was now called upon to decide this point for the first time, perhaps I might have been of another opinion: but I collect from those decisions, that if a man purchases an estate subject to a charge, and does no more than covenant with the vendor, that he shall be indemnified, it is not his own debt, to be paid out of his personal estate: but it remains a charge upon the estate, or rather a debt of his in respect of the estate only; and if nothing more has been done to take it upon himself, the debt must be paid out of that estate and not out of his personal estate. Lord Thurlow upon that occasion took great pains; and I do not know, that some doubts were not entertained upon it at that time: but from his great authority and the reasoning he made use of, it has been acquiesced in ever since.

It has been said, this executor has done right in paying; for by circuity unquestionably he might have been liable; and I agree, if an action had been brought against Brent, he might have compelled Butler in his life-time or his heir or devisee to indemnify him. But I believe, the decree would have been for a sale of the estate, and not for payment out of his personal estate. Upon a bill against the executor and devisee, the difficulty occurs, whether the decree should be, that the devisee should pay, or the executor. But suppose, Butler had incumbered or sold the estate: his personal estate must have answered it; and the purchaser would not have been answerable. The question upon the circumstances of this case is only, whether such an agreement makes this the personal debt of Butler; as if Bernard had released Brent, and then *taken [* 539] a bond from Butler; and that, I take it, is necessary to make the debt his own, and was the ground, upon which I went in *Woods v. Huntingford*; upon the circumstances of which case I was of opinion, that, if they did not make it the debt of Richard Huntingford, no circumstances could have that effect upon any debt, that was not originally the debt of the party.

In this case I am under the necessity of holding, that the Report is wrong; and though the executor was not punishable for having this, the Plaintiff must be reimbursed out of his personal estate. The exception must therefore be allowed.

SEE note 3 to *Hamilton v. Worley*, 2 V. 62.

HAMMOND v. DOUGLAS.

[1800, JULY 31.]

THE good-will of a trade, carried on in partnership without articles, survives; and is not partnership stock. (a)
 Profits, accrued after the death of one partner, are joint property. (b)

EXCEPTIONS were taken to the Master's Report; on the ground, 1st, That the Master stated the sum of 2100*l.* arising by the sale of the good-will of the trade, to belong to the joint estate of John Douglas and Joseph Douglas deceased: whereas he ought to have stated, that it belonged to the estate of Joseph Douglas only:

Secondly, that the Master stated the sum of 500*l.* arising from the profits of the trade between the deaths of John Douglas and Joseph Douglas to belong to the joint estate; whereas he ought to have stated that to belong to the estate of Joseph.

John Douglas and Joseph Douglas had carried on the trade of snuff-makers in partnership, without articles, in a house devised by their father to them and their heirs. Joseph was the survivor.

Mr. Mansfield and Mr. Wyatt, in support of the exceptions.

The Attorney General, [Sir John Mitford], Mr. Richards, and Mr. Stanley, for the Report said, the good-will was considered as part of the stock in trade.

The Lord CHANCELLOR [LOUGHBOROUGH] was clearly of opinion, that upon a partnership without articles the good-will survives; and a sale of it cannot be compelled by the representative [*540] of the deceased partner; *being the right of the survivor, which the law gives him to carry on the trade; it is not partnership stock; of which the executor may compel a division.

The first exception was allowed; the second over-ruled (1).

THE doctrine of the principal case, that the good-will of a partnership trade survives, unless the articles of partnership expressly make a different provision, was

(a) This is said not to be law in *Dougherty v. Van Nostrand*, 1 Hoff. 68, where it is held that this good-will is partnership property and does not survive. A doubt was expressed in reference to the survivorship of a good-will in *Crawshay v. Collins*, 15 Ves. 227, but that doubt was over-ruled in *Lewis v. Langdon*, 7 Sim. 421. See also *Farr v. Pearce*, 3 Madd. 47; 3 Kent, (5th ed.) 64, 65.

The good-will of a business has been recognized as a valuable interest in Equity. *Kennedy v. Lee*, 3 Meriv. 452, 455; *Chissam v. Dawes*, 5 Russ. 29. See *Knott v. Morgan*, 2 Keen, 213; *Bell v. Locke*, 8 Paige, 75. See also upon this subject of good-will, Story, Partnership, § 99, § 100, and notes; Collyer, on Partnership, (2d Am. ed.) 80, *et seq.*

(b) See Story, Partnership, § 343, § 349, and note; Collyer, Partnership, (2d Am. ed.) 177, *et seq.*; *Sigourney v. Munn*, 7 Conn. 11; 3 Kent, (5th ed.) 64.

(1) Register's Book, A. 1799, fo. 1132; *post*, *Crawshay v. Collins*, vol. xv. 218; *Featherstonhaugh v. Fenwick*, xvii. 298. Lord Eldon expressed considerable doubt, upon the decision on the first exception, that the good-will survived. See, *ante*, vol. i. 434, 5; *post*, ix. 596, 597, and the notes, as to the principle of the law of merchants, in Equity controlling the legal right of survivorship; and as to the distinction between commercial and professional partnerships, with reference to the good-will, surviving in the latter, *Farr v. Pearce*, 3 Madd. 74; *Pearce v. Chamberlaine*, 2 Ves. 33.

doubted in *Crawshaw v. Collins*, 15 Ves. 227, and a distinction, in this respect, has been suggested, between commercial and professional partnerships; the advantage of established connexions in the latter being held to survive; unless that benefit is excluded by positive stipulation. *Farr v. Pearce*, 3 Mad. 79. That if profits be made by continuing to deal with what was joint stock, after the dissolution of a partnership, by death or otherwise, such profits must be accounted for as a joint interest, seems fully established. *Featherstonhaugh v. Fenwick*, 17 Ves. 310; *Crawshaw v. Collins*, 1 Jac. & Walk. 279.

HARTLEY v. HURLE.

[ROLLS.—1800, JULY 30, 31.]

To exempt the personal estate from the payment of the debts the will must afford a necessary implication: namely, that inference, that leaves no doubt upon the mind of the Judge. (a)

Testator gave, devised, and bequeathed, all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his moneys in the funds, to trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein; and declared the trust of the rents, issues, and profits, dividends interest and proceeds, subject to ground-rents and other out-goings in respect of his said messuages, lands, &c.: the leasehold estates pass with the freehold upon the subsequent words, [p. 540.]

Bequest in trust to pay the annual produce into the proper hands of a married woman is a bequest to her separate use, (b) [p. 545.]

HENRY ALLEN, by his will directed, that all his just debts, funeral and testamentary expenses, be in the first place fully paid and satisfied. He then gave and bequeathed to his dear wife Ann all his household goods and furniture of household, plate, jewels, linen and china, in, upon, and about, his two houses at Islington and Ramsbury, to and for her own absolute use and benefit. Also he gave her all such sum and sums of money, benefit, right, and interest,

(a) *Ancaster v. Mayer*, 1 Bro. C. C. (Am. ed. 1844,) 454, Mr. Belt's note (2), and cases cited; 467, note (a), and cases cited; *Samuell v. Wake*, ib. 144; *Ram on Assets*, ch. 3, § 5, p. 41-44; *Driver v. Ferrand*, 1 Russ. & My. 681; *Rhodes v. Rudge*, 1 Sim. 79; 2 Williams, Executors, (2d Am. ed.) pt. 4, b. 1, ch. 2, § 1, p. 1213, 1214, *et seq.*, 1218, and cases cited in note (v); *Boole v. Blundell*, 1 Meriv 230; *Webb v. Jones*, 2 Bro. C. C. (Am. ed. 1844,) 60, note (1).

The personal estate should be exhausted before a resort to the real, unless the latter be expressly charged. See the cases cited above; *M'Campbell v. M'Campbell*, 5 Litt. 95; *Wyse v. Smith*, 4 Gill & John. 295; *Dunlap v. Dunlap*, 4 Desaus 305, 329; *Rogers v. Rogers*, 1 Paige, 188; *Livingston v. Livingston*, 3 Johns. Ch. 148, 153; *Hoye v. Brewer*, 3 Gill & Johns. 153; 1 Story, Eq. Jur. § 571; *Stevens v. Gregg*, 10 Gill & John. 143; *Tessier v. Wyse*, 3 Bland, 28; *Garnet v. Macon*, 2 Brock. 185; *Lewis v. Thornton*, 6 Munf. 87.

What shall constitute proof of an intended exemption of the personal estate by the testator, is not, in many cases, ascertainable on abstract principles; but must depend on circumstances. 1 Story, Eq. § 572-574; 2 ib. § 1245, 1247 a. See *Lupton v. Lupton*, 2 Johns. Ch. 614; *Livingston v. Newkirk*, 3 Johns. Ch. 319; *Graves v. Graves*, 8 Sim. 43; *Dover v. Gregory*, 10 Sim. 393; *Parker v. Marchant*, 1 Younge & Coll. N. R. 290; *Kidney v. Coussmaker*, ante, 1 V. 436, note (a); *Burton v. Knowlton*, ante, 3 V. 107, note (a).

(b) *Ante*, *Lamb v. Milnes*, p. 517, note (a), and cases cited to this point.

which shall become due and payable from the Amicable Society for perpetual Assurance of Serjeant's Inn. He gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and also all his moneys in the funds, to his son-in-law William Hartley and his worthy friend Henry Hurle, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; upon trust, that they and the survivor, his heirs, executors, administrators, and assigns, shall and do out of the rents, issues, and profits, of his said messuages, lands, tenements, and hereditaments, and the dividends, interests, and proceeds of his moneys in the funds, pay all his just debts, funeral and testamentary expenses, and the several legacies or sums of money hereinafter mentioned: that is to say; to his wife 150*l.* immediately after his decease: to Henry Hurle, for the trouble he may have in the execution of the trusts of the will, 100*l.*

The testator then gave several other legacies; all which legacies he directed to be paid within twelve months next after his decease, or sooner, if his trustees should think proper. He also directed, that his trustees should from time to time, out of the rents, issues, and profits, of his said messuages, lands, tenements, and hereditaments, and the dividends, interest, and proceeds, of his money in the funds, pay an annuity of 300*l.* a-year to his wife during her life, [* 541] the first * payment to be within six months after his decease; and upon farther trust, that they shall pay all the rest and residue of the said rents, issues, and profits, dividends, interest, and proceeds, (subject to ground-rents and other outgoings in respect of his said messuages, lands, tenements, and hereditaments) into the proper hands of his daughter Ann Hartley, until his grand-daughter Ann Hartley shall attain the age of twenty-one, or be married; which shall first happen; and when and so soon as she shall attain twenty-one, or be married, then upon trust, that they shall and do out of the rents, issues, and profits, dividends, interest, and proceeds, as aforesaid, pay his said grand-daughter an annuity of 300*l.* a-year during her life; and shall and do pay the residue and overplus of the said rents, issues, and profits, dividends, interest, and proceeds, after satisfying the said annuity, and ground-rents and outgoings, as aforesaid, into the hands of his said daughter during her life, to and for her own use and benefit; and from and immediately after the decease of his daughter he gave, devised, and bequeathed, all his said messuages, lands, tenements, and hereditaments, moneys in the funds, and the dividends, interest, and proceeds, then due from the same, and all his estate and interest therein, unto and to the use of his grand-daughter, her heirs, executors, administrators and assigns, subject to the proviso and declaration after-mentioned: provided, that in case his grand-daughter shall not at the decease of his daughter have attained the age of twenty-one or be married, then that his trustees shall continue to receive the rents, issues and profits, divi-

dends, interest and proceeds, for her use and benefit, until she shall have attained that age, or been married.

The testator then expressly declared, that his leasehold estates should not be sold. All the rest and residue of his real and personal estate, whatsoever and wheresoever, and of what nature, kind, and quality, soever the same may be, not by him otherwise given and disposed of, he gave, devised and bequeathed unto his said daughter, her heirs, executors, administrators, and assigns, absolutely and for ever; and he appointed the said William Hartley, his daughter Ann Hartley, and the said Henry Hurle, his executors.

* After the death of the testator the bill was filed by Wil- [* 542] liam Hartley, administrator of his wife, the testator's daughter, also deceased, against Henry Hurle, and the infant grand-daughter of the testator, who was heir at law to him and to her mother. The will having been established, and the cause coming on for farther directions, the principal question was, whether the personal estate was exempt from the debts.

Another question, not appearing on the pleadings, was suggested at the bar; whether the leasehold estates passed under the disposition creating a fund for the debts.

Mr. Stanley and Mr. Johnson, for the Plaintiff. The personal estate is by this will exempted from the debts, upon all the authorities down to the late cases (1), and particularly *Burton v. Knowlton* (2); in which your Honor went very fully into them all. There was no particular exemption in that case. In this case, though there is first a general direction, that the debts and funeral and testamentary expenses shall be paid, the testator has immediately afterwards provided a particular fund, which is very ample, amounting to 1200*l.* a-year, for the debts, legacies, and annuities. The personal estate he has given as a residue. The words are very near those in *Burton v. Knowlton*. The Courts have been uniformly of opinion, that to exempt the personal estate there must be express words or demonstration plain. In this case the intention is clear. The residuary bequest comprises expressly all the personal estate not by him otherwise given and disposed of. This does not come within *The Duke of Ancaster v. Mayer* (3) or *Brummel v. Prothero* (4). There is, I admit, a shade of difference between this case and *Burton v. Knowlton* from the first direction in the outset of the will for the payment of his debts; but that is not sufficient. It is clear, he intended to give as a particular bounty all the remainder of his estate, except what was before given specifically. In *Tait v. Lord Northwick* (5), there was an ingredient, that the funeral and testamentary expenses were not provided for; which in this instance are ex-

(1) *Gray v. Minnethorpe*, ante, vol. iii. 103, the three cases immediately following, and the note, 106.

(2) *Ante*, vol. iii. 107.

(3) 1 Bro. C. C. 454.

(4) *Ante*, vol. iii. 111.

(5) *Ante*, vol. iv. 816.

pressly charged upon this fund, not by law liable to them. This is a disposition not only of real estate, but also of personal property, money in the funds; which alone is more considerable than the debts. The testator's daughter is not a trustee for payment of the debts. She is an executrix: but this *is not given to her in that character. That was relied on in

Burton v. Knowlton

The next question is, what passed by this clause for the purpose of creating a fund for the debts. The words, "messuages, lands, tenements, and hereditaments" are certainly very comprehensive. It will be contended, that they include leasehold estate; and certainly the subsequent words favor that construction. If upon reading the will the Court should have any doubt upon this point, the case ought to stand over.

Mr. *Richards* and Mr. *W. Agar*, for the Defendants, upon the second point were stopped by the Court.

The MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN]. Upon that point the first words, "messuages, lands, tenements, and hereditaments," alone certainly would not pass a leasehold estate: but I am clearly of opinion, that what follows is sufficient. He gives his messuages, lands, tenements, and hereditaments, and his moneys in the funds, to the trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; and the word "ground-rents" puts it out of all doubt (1).

For the Defendants, upon the other question. These cases must depend upon their own circumstances. The question must be, whether there is demonstration plain of an intention to exonerate the personal estate. There is none of the evidence of that intention in this will, upon which your Honor relied in *Burton v. Knowlton*. No expression showing an intention to discharge the personal estate, is to be found. The will begins by a direction, that all the debts, funeral and testamentary expenses, are to be paid. That would charge the real estate as well as the personal (2): but the personal estate must be first applied. According to the common construction the personal estate is pointed to by that clause, as the fund first applicable. The specific articles then given to the testator's wife are taken out of that fund. The next disposition charges the real estate, as an auxiliary fund, with the debts and legacies. If the testator intended the debts to be charged exclusively upon that part [*544] * of his property, such intention would have been shown.

The word "real" in the residuary clause can have no meaning, all the real estate being given before, except to show, he did not mean the personal estate to be exempt. *Burton v. Knowlton* has these remarkable words "not before specifically disposed of;" which are wanting in this will. Can the Court find words in this

(1) *Thompson v. Lawley*, ante, 476, and the note, 478.

(2) *Ante*, *Keeling v. Brown*, 359; *Chitty v. Williams*, *Shallcross v. Finden*, vol. iii. 545, 738; *Kidney v. Coussmaker*, i. 436; ii. 267, and the note, i. 447.

will to authorize a sale of the freehold estate? for the leasehold cannot be sold. The real property is limited with a view to keep it in his family. There is no case, in which, the will containing such a general direction as this for the payment of the debts, any gift of the residue afterwards has been held discharged without an express exemption. *Samuel v. Wake* (1). *Noke v. Darby* (2). By a residuary disposition the testator only means, that he will not die intestate as to any part of his property: and with that view he throws in the words "real estate."

Mr. *Stanley*, in reply. There are other parts of the property taken out of the residue: namely, after the legacies to the wife all his money in the funds; which he takes out of the personal estate; and has appropriated to this fund. It is not therefore to be considered the general residue after payment of the debts, but after those specific articles are taken out of it, either for the wife or for this purpose. It has been considered in all the modern cases, that an express exemption is not necessary; the dispute has always been, what constitutes demonstration plain; and there has been a good deal of cavil upon the expression "irresistible inference." Under this trust an ample fund is provided, even without resorting to the real estate: but if it should prove very inconvenient to pay the debts out of the rents or dividends, the Court would apply the capital.

July 31st. The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only question, that remains in this cause, is, whether the personal estate given to the daughter of the testator is exempted from the payment of his debts. The effect of the will is, that, after a general direction, that the debts and funeral and testamentary expenses shall be paid, which I consider as a direction to his executors to pay them, the persons, who take the personal estate, and which operates as a trust upon them to pay those debts, he gives certain parts of his personal estate to his *wife. [*545] He then creates a fund; which he vests in two trustees, who are two of his executors, for the purpose of doing that which he had before directed to be done, to pay his debts and funeral and testamentary expenses, and not only these, but likewise his legacies. The legacies therefore are without all doubt charged only on this fund. The fund thus created consisted of the testator's real estate and a part of his personal estate. After creating this fund he gives the annual produce of it, subject to the debts, legacies and annuities, to his daughter, as I conceive, to her sole and separate use. The direction is to pay into her proper hands (3). After her decease the trust is declared for his grand-daughter at twenty-one or marriage; and then follows the residuary clause.

It was contended, that this is a specific gift of the personal estate

(1) 1 Bro. C. C. 144.

(2) 3 Bro. P. C. 290.

(3) See *Lumb v. Miles*, ante, 517; [note (a), and cases cited;] and the note, 520; post, *Adamson v. Armistage*, vol. xix. 416; Coop. 263; 1 Madd. 208.

undisposed of to his daughter exempt from the payment of his debts. Whatever might have been my opinion upon this case before the case of *Tait v. Lord Northwick*, I must now be extremely cautious, before I proceed to decide upon this point beyond the case of *Burton v. Knowlton*; for it is extremely clear, the noble Lord, who decided *Tait v. Lord Northwick*, intimated a strong doubt of the propriety of my determination. I have had occasion, and have taken great pains, to consider that case very fully, since this was argued last night; and I think, if I was to decide it again, I should still be of the same opinion. But there are many distinctions between that case and this. First, in that the will does not set out with any direction for the payment of the debts. The testatrix begins with a devise to trustees in trust to pay all the debts and funeral expenses; and after having so done and having disposed of the surplus of that fund, and of part of her personal estate, she gives to her executor, but not in trust for himself, but for such uses as she should appoint, the residue of her personal estate not before specifically disposed of, and, for default of appointment, to him for his own use and benefit.

The residuary clause in this will is not a specific gift at all, except with reference to what is before given. It is not merely personal estate, but the rest and residue of his real and personal estate not otherwise given; whereas he had given all his real estate before in trust for the payment of his debts; and I must admit, his [* 546] funeral *and testamentary expenses are included. It is impossible to suppose it any thing more than a gift of what was not before given, not as a specific bequest, but of what might have been omitted; not to the separate use of his daughter, but to her generally; not to be paid into her proper hands. So, it appears to be, that after a general direction for the payment of his debts and funeral and testamentary expenses he gives all his real estates and a considerable part of his personal estate, his money in the funds, to trustees for the payment of his debts, &c.; and then makes this general residuary disposition. However I may be more liberal than others in construing a will in favor of the legatee of the personal estate, and nine times in ten I really believe upon such gifts the Court by its rules has violated the intention, yet, whatever may be my own idea upon it, I will not set that up against the rules, that have been laid down by great men; and from all the cases, *The Duke of Ancaster v. Mayer*, and all the others, I find, that, unless there is a necessary implication, the personal estate shall not be exempt. I have before (1) had occasion to comment upon the sort of implication. It cannot be an irresistible inference; but that inference, that leaves no doubt upon the mind of the person to decide. But I find no case, as has been fairly admitted, in which the testator, after beginning with a direction for the payment of the debts and

(1) *Ante*, vol. iii. 113, in *Brummel v. Prothero*. See Lord Eldon's definition of necessary implication, 1 Ves. & Bea. 466; and in the note, *ante*, 534.

funeral expenses, which naturally fall upon the personal estate, and are to be paid by the executors, has created a fund for his debts and funeral expenses, and then given the residue by such words, (for it is not given to the separate use of his daughter) and it has been held, that he meant that trust fund as any thing more than auxiliary, if the personal estate should be deficient; and with that impression I am not at liberty to decide in favor of the residuary legatee as to the exemption of the subject of that residuary disposition; which I consider as only general words thrown in, perhaps without any definite intention. Therefore with some reluctance, but bound down by the authorities, I decide, that there is not sufficient in this residuary disposition to exempt it from the payment of the debts.

Aug. 1st. The next evening the Master of the Rolls observed, that the subject of the residuary clause is, not specifically the residue of the personal estate, but the residue of the real and personal estate not *by him otherwise given and disposed [* 547] of; and he had made all his real estate a fund for the debts; and therefore it is the residue of the very fund, which he had created for his debts.

1. As to the words necessary to give a separate estate to a married woman; see, *ante*, note 1 to *Lumb v. Milnes*, 5 V. 517.

2. Express words, or necessary implication, must be shown in order to exempt a testator's personal assets from being applied, as the primary fund, for discharge of his debts and legacies; see note 2 to *Hammond v. Worley*, 2 V. 62; and note 1 to *Burton v. Knowlton*, 3 V. 107; with the farther references there given.

FRENCH v. DEAR.

[1800, August 1.]

BILL by a former church-warden against the parish officers, trustees of an estate for the poor of the parish, and forty inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment. Upon demurrer the Lord Chancellor expressed a strong opinion against such a bill; and as it appeared not to be signed by Counsel, ordered it to be taken off the file, and the Plaintiff to pay the costs. (a)

THE bill, filed in 1798, stated a seoffment in the 10th year of King Charles II., in trust for the poor of the parish of Byfleet; to be under the management of the churchwardens and overseers of the poor. It farther stated, that the election of churchwardens in that parish is in the rector and the inhabitants at large. The Plain-

(a) Every bill whether original or not must have the signature of counsel annexed to it. Story, Eq. Pl. § 47, § 269; *Kirkley v. Burton*, 5 Madd. 378; 1 Smith, Ch. Pr. (Am. ed.) 106; Ayckbourn, Ch. Pr. (Lond. ed. 1844,) 5, 6; Cooper, Eq. Pl. 18; 1 Barbour, Ch. Pr. 43, 44; *Hatch v. Eustaphiev*, 1 Clarke, 63; 1 Hoff. Ch. Pr. 97.

tiff and Thomas Brooks were elected churchwardens at Easter 1795. Previously to that an action had been commenced against the Defendant Dear, who was tenant of the trust estate, for the purpose of recovering the arrears of rent, by the direction of the vestry. Soon after Easter 1795, the rector and the Plaintiff and several other inhabitants were at a vestry elected new trustees of the estate; and the churchwardens were directed to procure a conveyance from the surviving trustee to the new trustees, and to prosecute the action, which had been commenced. The same churchwardens were again elected at Easter 1796, for the ensuing year; and continued in office till Easter 1797. They proceeded with the privity of the overseers of the poor; and the Plaintiff expended in all 109*l.* 4*s.* At a vestry held at Easter 1797, just before the Plaintiff went out of office, a resolution was made, and entered upon the books, that that sum should be paid; which resolution was signed by the rector, the churchwardens, the overseers of the poor, and the majority of the parishioners present. The new churchwardens being sworn very soon after that meeting, no rate could be made for satisfaction of the Plaintiff's demand during his continuance in office. Subsequently to his ceasing to be churchwarden, the proceeding against the Defendant not being then finished, the Plaintiff continued to act, having had the direction of the proceedings; and thereby he expended 10*l.* 3*s.* 0 1-2*d.* more.

The bill was filed against the churchwardens, the co-trustees, and about forty inhabitants of the parish; praying a discovery and account of what is due to the Plaintiff; and that a rate, if [* 548] necessary, *may be directed to be made for the purpose of raising money to answer such payments; or that the same may be answered out of the trust estate by sale or mortgage; and if that shall not be sufficient, that the remainder may be answered by the said Defendants, who are parishioners, rateably with the Plaintiff.

The Defendant Dear, who was not a trustee nor a parish officer, put in a demurrer to the relief. He also put in an answer as to the discovery; admitting, that the Plaintiff had been one of the churchwardens; and that the defendant is one of the parishioners of the parish, and liable to the legal rates therein made.

The Lord CHANCELLOR [LOUGHBOROUGH] took notice, that the bill was not signed by Counsel; and upon the nature of the bill observed, that it was a most pernicious and absurd attempt to make a parish reimburse a parish officer.

Mr. *Thompson*, in support of the bill. This species of relief has been applied in several instances. The bill prays in the alternative. If the Plaintiff cannot be relieved, he will sustain a great hardship. He was directed by the vestry to obtain a conveyance of the trust estate of this parish from the surviving trustee to the new trustees. He was also directed to proceed to recover the arrears of rent from the tenant; who happens to be this Defendant. In the pursuit of these objects the Plaintiff has incurred this expense. His account was

allowed by the vestry, and signed; and an order of vestry for the payment signed by the rector, all the parish officers and the majority of the parishioners present. The expense being contingent from the nature of the business, it could not be determined till about the time he retired from office. From that circumstance, even if this was within the Statute of Elizabeth (1), he could not have made a rate. It is impossible for him to sue any where else than in this Court. In *Blackbourn v. Webster* (2) such a bill was sustained. That decree could not be with reference to the Statute; for that does not require any vestry for making a rate; and liberty was given to the Plaintiff to apply to the Court to compel the parishioners to pay their proportions. It was therefore not at all upon the Statute. In a case in Viner a bill was filed against ninety parishioners; and in the same book there is another case of the same kind.

* The whole of this expense was incurred for the benefit [* 549] of this estate; and this Defendant is the tenant in possession of that estate, out of which the Plaintiff seeks to be reimbursed.

Secondly, This is a demurrer to the relief, not to the discovery; as to which there is an answer. In point of form this answer is extremely inconsistent with the demurrer. The discovery is merely assistant to the relief. Therefore the demurrer ought to have been general. If it is taken as an answer, it is insufficient: omitting to notice all the material allegations of the bill. The Plaintiff has a right to suppose, that this Defendant attended the vestry, and signed the resolution.

The *Attorney General* [Sir John Mitford] and Mr. Short, for the Demurrer. This demand is set up with respect to the alleged expense of procuring a conveyance of a charity estate. What has the poor rate to do with that? Another demand is for the expense of proceeding against the tenant to recover the arrear of rent. With regard to the poor-rate it has been determined over and over again at law, that the overseer of the poor not being bound to pay any thing in advance, but having a right first to make the rate, it is material, that he should do so; and where he has neglected it, he is utterly without relief: *The King v. Wavell* (3); and the case (4) there cited from Salkeld and other books. *Batterley v. Cook* (5) shows, the Plaintiff is not without remedy; and that the other case referred to in Mr. Cox's note (6) over-ruled those cited for the Plaintiff. A church-rate is quite different.

Mr Thomson, in reply. *Batterley v. Cook* has no immediate allusion to this case; for the parish officer had been allowed that specific sum in his accounts; and the balance was general, not with reference to the particular demand. Your Lordship will not allow

(1) 43 Eliz. c. 2.

(2) 2 P. Will. 632.

(3) Doug. 111.

(4) *Tawney's Case*, 2 Salk. 531; 2 Lord Raym. 1009; 6 Mod. 97.

(5) Pre. Ch. 42; *Ex parte Fowler*, 1 Jac. & Walk. 70. See the note, 73

(6) 2 P. Will. 634.

this demurrer; for the bill is certainly sustainable against all those, who are parties to the agreement; and the Defendant has signed the account and the order for payment.

LORD CHANCELLOR [LOUGHBOROUGH]. I collect from these cases, which I was not aware of, that the bill was against a definite description of people; the churchwardens, or the churchwardens and the vestry, with the vicar. This bill is filed against all the [* 550] inhabitants. * Forty persons are actually Defendants. If

I entertain such a jurisdiction, I shall ruin half the parishes in the kingdom. A church rate for the repair of the church is quite upon different ground. A very late case has occurred; in which the Court of King's Bench granted an information against a Justice for making a rate to reimburse money clearly due. The impolicy of it is perfectly obvious.

But in this case the bill not being signed by Counsel, I shall do nothing but order it to be taken off the file (1). I will not suffer a bill not signed by Counsel to remain in Court. The Plaintiff must pay the costs undoubtedly.

1. AN account cannot be decreed against so fluctuating a body as a parish, which is not at all similar to a corporation. A parish, therefore, cannot, as such, be made responsible for trust or charity funds misapplied, during a long period, to parish purposes, under orders of the vestry: the retrospective relief, if any can be given, must be sought against those parish officers, as individuals, by whom, or during whose continuance in office, the breaches of trust complained of were committed. But with a view to the prospective interests of the charity, a reference may be directed to the Master, to approve a scheme for the future regulations of the trust. *Ex parte Fowler*, 1 Jac. & Walk. 73; *Lanchester v. Thompson*, 5 Mad. 12.

2. It is a good ground of demurrer, if the name of counsel do not appear to a bill in Equity. *Kirby v. Burton*, 5 Mad. 378. And it is no contempt not to answer such a bill. *Farly v. Childe*, Cary, 160.

(1) *Dillon v. Francis*, 1 Dick. 68. So as to an answer: *Brown v. Bruce*, 2 Mer. 1; [Story, Eq. Pl. § 876; Ayckbourn, Ch. Pr. (Lond. ed. 1844,) 61, 62; 1 Smith, Ch. Pr. (Am. ed.) 243; *Simes v. Smith*, 4 Madd. 466; 1 Barbour, Ch. Pr. 142.] See Orders in Chancery, Mr. Beames's edit. 25, 70, 165. It is a ground of demurrer; *Kirkley v. Burton*, 5 Madd. 378.

FLETCHER v. HOGHTON.

[1800, August 1.]

DEVISE to trustees and their heirs to the use of other trustees for 1000 years; upon trust by sale, lease, mortgage, or otherwise, to raise and pay such sum as the personal estate should fall short of the debts; and after raising and paying thereof then in strict settlement.

A bill being filed by creditors, the personal estate proving deficient, and the trustees of the inheritance having contracted to sell under a power, upon their supplemental bill, (a) praying the benefit of the accounts against the surviving trustee of the term, though no party to the original cause, that the debts may be paid out of the purchase-money, and that on payment the term may be assigned to the purchasers, it was so decreed; the Defendants not objecting, [p. 550.]

SIR HENRY HOGHTON by his will, dated the 3d of July, 1783, after giving two annuities, devised his real estates to trustees for ninety-nine years, for securing the payment of the said annuities; and subject thereto he devised the said real estate to Samuel and Thomas Fenton and their heirs, to the use of Lawrence Rawstorne and William Shawe, their executors and administrators, for 1000 years, commencing from his death; without impeachment of waste; upon trust, that they or the survivor, &c., should by grant, sale, lease, or mortgage, of the said premises comprised in the said term of 1000 years, or otherwise, as they should think proper, levy and raise such sum of money as his personal estate should fall short of paying his debts, legacies, and funeral expenses; and, after levying, raising and paying, thereof, then to the use of the testator's son Henry Hoghton for life; remainder to his first and other sons in tail male; remainder to Daniel Hoghton in tail male; with the ultimate remainder to the testator's right heirs.

The will contained a power for the said trustees with the consent of the person entitled to the possession of the estate thereby devised for the time being to sell or exchange the same in such manner as in the will mentioned.

* Samuel and Thomas Fenton died in the life of the [* 551] testator. Shawe also died. An act of Parliament was obtained for appointing new trustees in their room, and for enabling such trustees to exchange part of the lands devised for lands, of which Sir Henry Philip Hoghton, the son, or Daniel Hoghton, was seised in fee, and for enabling the tenants for life to make conveyances in fee and building leases. Robert Fletcher and John Pilkington were appointed trustees.

A bill was filed by creditors for an account and application of the personal estates to the debts, legacies, and funeral expenses; and if the personal estate should be insufficient, then that the real

(a) As to the nature and uses of supplemental bills and when they are allowed, see Lubé, Eq. Pl. (1st Am. ed.) ch. 16, p. 136, *et seq.*, and Wheeler's notes; Story, Eq. Pl. § 332, *et seq.*; Barbour, Ch. Pr. 362, *et seq.*

estate or a competent part may be sold. The usual decree was made for taking the necessary accounts; reserving farther directions; with liberty to apply concerning the real estate.

The personal estate amounting only to 526*l.* 15*s.*, the Defendant Sir Henry Philip Hoghton, the administrator, paid on account of the legacies and in part discharge of the debts 13,704*l.* 6*s.* The debts amounted to 25,222*l.* 15*s.* 6*d.* The trustees Fletcher and Pilkington contracted for the sale of the real estates under the power; intending to lay out the money in other purchases; but upon a suggestion, that the contracts could not be performed without the purchasers having an assignment of the term, and that, as such assignment could not take place, before the whole of the debts were paid, the money arising by the sale ought, instead of being laid out in the purchase of land, to be applied in the payment of the debts, they filed a supplemental bill; praying, that the Plaintiffs may have the benefits of the accounts taken in the original cause against Rawstorne, though he was not a party to that cause; and that the debts may be paid out of the purchase-money of the estates contracted to be sold; and that upon payment of such debts Rawstorne may be decreed to assign the term for the benefit of the purchasers: so that the trustees might be enabled to complete their sales.

The Defendants stated, that they had no objection to the prayer of the supplemental bill, and the decree was made accordingly.

SUPPLEMENTAL bills are often brought in aid of a decree; and directions are given under the supplemental bill, that the new matter should be connected with the former decree; *Dormer v. Fortescue*, 3 Atk. 133; but whenever a supplemental bill brings before the Court a new party, or a new interest, the previous decree is open to all objections which might have been taken at the first hearing. *Hill v. Chapman*, 3 Brown, 391.

[* 552]

ROBINSON v. WALCOTT.

[1800, AUGUST 2.]

ON motion at the last seal after Trinity Term to make absolute an order to dissolve an injunction *nisi*, the Plaintiff cannot have time till the next day of motions upon the usual undertaking to show cause on the merits; but was permitted to show cause during the petitions. (a)

ON this day, being the last Seal after Trinity Term, Mr. Mansfield, for the Defendant, moved to make absolute an order to dissolve the Injunction, *nisi*, obtained on the 24th of July (1).

Mr. Johnson, for the Plaintiff, insisted as of course upon his

(a) *Fielding v. Capes*, 4 Madd. 393; 1 Smith, Ch. Pr. (Am. ed.) 617.

(1) This case is corrected according to the Register's Book, as stated 2 Madd. 259; *Rew v. Dixon*.

right to have time till the next day of motions; undertaking not to except, but to show cause upon the merits.

For the Defendant, that was admitted to be very frequent in term: but it was said, that it never was done at the last Seal before the long Vacation: the effect being to continue the Injunction to the Seal before Michaelmas Term; and it never can be the meaning of the undertaking not to except, that the Injunction shall be continued for three months.

LORD CHANCELLOR [LOUGHBOROUGH]. Do you ever remember such a practice at the last Seal? It is taking the Injunction for three months. The only question is, whether it can be done at the last Seal. The common practice does not apply to it at all. There is no mischief in that.

For the Plaintiff. It was said, the bill was filed in 1798; and the answer was but just come in.

The *Attorney General*, [Sir John Mitford], (*Amicus curiæ*), observed, that the reason of giving time to show cause on the merits is, that the moment the answer is upon the file the Defendant may get the order for dissolving the Injunction *nisi*; and as it is impossible in four days, the Plaintiff is usually indulged with a short time for the purpose of showing cause on the merits; and where it has happened upon the last Seal, the Court has permitted cause to be shown during the petitions.

LORD CHANCELLOR, adopted that course; and ordered the Plaintiff to show cause on the following Thursday.

THE principal case was declared by Sir Samuel Romilly to be misreported; the motion was, that the order for dissolving the injunction might be made *absolute*: *Reu v. Dixon*, 259: but where a motion *nisi*, to dissolve an injunction obtained to restrain proceedings at law, was not made till the last Seal after Trinity term, a day was (as in the principal case) appointed during the petitions, for showing cause why the order should not be made absolute; as otherwise the trial (if it was proper it should take place at all) might have been injuriously delayed: *Felding v. Capes*, 4 Mad. 393.

FORTESQUE v. GREGOR.

[* 553]

[1800, AUGUST 5.]

POWER of appointment among three persons executed by a transfer of one third to one under an order on petition stating, that the person having the power was desirous, that the fund might be equally divided. That person dying without any farther execution, the Court gave the two remaining thirds respectively to another of the objects and to the administratrix of the third; who was dead; but had survived the person having the power.

JOHN FORTESCUE by his will gave to the children of Faithful Adrian Fortescue deceased the sum of 1000*l.* to be paid them in such shares and at such ages as William Innes should direct; and disposed of the residue.

There were three children of Fortescue: namely, Ann Hepworth;

Faithful Adrian Fortescue; and Katherine Cameron. Upon a bill filed by them and the residuary legatee the will was established; and the accounts directed. The legacy of 1000*l.* being invested in stock produced 1670*l.* 3 per cent. Annuities.

By a subsequent order, made on the 18th of July, 1788, upon the petition of Brodie Hepworth and Ann, his wife, stating, that she had attained the age of twenty-one; and that William Innes was desirous, that the said 1670*l.* 3 per cent. Annuities might be equally divided between the petitioner Ann Hepworth and her brother and sister, it was ordered, that the Accountant General should transfer to the petitioner Brodie Hepworth 556*l.* 14*s.* 4*d.* being one third part thereof. The transfer was made accordingly.

Katherine Cameron attained the age of twenty-one upon the 3d of June, 1791. Innes died upon the 14th January, 1795; not having made any farther appointment. Faithful Adrian Fortescue, the son, died on the 3d of November, 1796, intestate and without issue; and his mother took out administration to him.

A petition was presented by Mrs. Cameron; praying a transfer of a moiety of the remaining stock, or such other part as the Court shall think fit.

The mother of Faithful Adrian Fortescue, the son, claimed the other moiety as administratrix of her son.

The *Solicitor General*, [Sir *William Grant*], in support of the Petition, said, it was clear, the petitioner is entitled to [* 554] *one half of the remaining stock whatever doubt there may be as to the other.

Lord CHANCELLOR, [LOUGHBOROUGH]. The brother surviving Innes, I think, was entitled to the other third. The only difficulty I feel is, that the recital in that petition cannot well be taken to be an appointment. There is no deed (a).

The *Attorney General*, [Sir *John Mitford*], for the administratrix of the son observed, that no form of appointment was prescribed.

Lord CHANCELLOR. But it is only a recital in the order or petition (b). It comes however to the same thing; for it is clear by the appointment Innes meant to give Mrs. Hepworth her share. Then at his death, when there could be no farther appointment, the necessary consequence of his appointment is, that there were only two shares and two objects of the power; and there could be no survivorship.

Declare, that the petitioners are entitled according to the prayer of the petition; and I may declare, that the other third belongs to the administratrix of the brother as his personal estate (1).

THAT a recital may operate as an appointment; see *Wilson v. Piggott*, 2 Ves. Jun. 355.

(a) See Sugden, Powers, (4th Lond. ed.) 362, 363.

(b) In *Gee v. Gee*, 2 Dev. & Bat. Eq. 103, a marriage settlement was construed according to the recital. See *Doran v. Ross*, ante, 1 V. 59, note (a); 60, note (1).

(1) See the cases on appointment collected, ante, vol. i. 310, in the note to *Boyle v. The Bishop of Peterborough*; [299, note (a).]

WHITE v. WHITE.

[ROLLS.—1799, FEB. 22; 1800, AUGUST 7.—ANTE, VOL. IV. 24.]

UPON an inquiry directed on a rehearing, the Plaintiff appearing to have consented to the former renewal in 1786, the Defendant was held entitled to charge 500*l.* towards the fine upon that as well as all other renewals; and the decree was varied accordingly. (a)

THIS cause (reported *ante*, Vol. IV. 24.) was brought on again by the Defendant upon a petition of rehearing, complaining of that part of the decree, which charged him with the whole of the fine of 1170*l.* paid by him upon the renewal of the lease in 1786.

The ground, upon which the Defendant impeached the decree in that respect, was, that he was entitled to charge 500*l.* under the will as well upon that as the other renewals; the Plaintiff in fact having been privy and consenting to the renewal upon that occasion. Upon the 22d of February, 1799, the Master of the Rolls directed an inquiry as to that fact; with liberty to state any special circumstances.

The Master by his Report stated, from the examination of the Bishop of Gloucester, that the Plaintiff consented to the renewal in 1786. * He was not acquainted with the first [* 555] negotiation for the renewal, that took place on that occasion; but, before it was concluded, he was informed of it by the Bishop; who said he would not renew, except the Plaintiff chose, unless the Defendant would put in the life of the Plaintiff's son: but the Plaintiff expressly told him to take the Defendant's money.

Mr. Romilly and Mr. Fonblanque, for the Defendant.

Mr. Richards and Mr. W. Agar, for the Plaintiff.

THE MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. My opinion is, that the Defendant is a trustee as well as tenant for life. In that situation it was his duty to consult the interest of the *Cestuis que trust*, and to get the estate made better by the renewal for the benefit of those to come after him. In applying for a renewal without any communication with the remainder-man he did wrong; and would have lost his money. But if a trustee with the consent of the *Cestuy que trust* does an act for his benefit, he is bound by it; and it now appears, that the Plaintiff consented absolutely; desiring the Bishop to take the Defendant's money. I have no difficulty upon the principles, upon which I made the decree, to say, the Defendant must be allowed the sum of 500*l.* upon this occasion as well as upon the other renewals.

The decree was varied accordingly by letting in the charge of 500*l.* in favor of the Defendant towards the fine paid by him in

(a) See as to the apportionment of the expenses between tenant for life and remainder man, *Pickering v. Fowles*, 1 Bro. C. C. (Am. ed. 1844,) 197-199, and notes; *Nightingale v. Lawson*, ib. 440-444, notes and cases cited; *Stone v. Theed*, 2 ib. 243; 1 Story, Eq. Jur. § 487, § 488; 4 Kent, (5th ed.) 74-76.

1786. The costs of the cause were ordered to be paid by the Plaintiff, and then to be charged upon the reversion (1).

SEE, *ante*, the notes to S. C. 4 V. 24.

BARRET v. BLAGRAVE.

[1800, AUGUST 8.]

INJUNCTION granted, to restrain a breach of covenant, secured by forfeiture of the lease and a penalty. (a)

A Motion for an injunction was made upon a bill filed, and affidavits; which were very full to the following facts.

The house of the Defendants Blagrove and his wife in Vauxhall Walk, adjoining the public gardens, had been originally let for 70 years by Tyers and Barret, the proprietors of Vauxhall Gardens, under an express covenant not to carry on the trade of victualler, retailer of wine, and several other trades therein specified, [*556] *or generally, any employment, that will be to the damage of the proprietors of Vauxhall Gardens; upon penalty of the forfeiture of the lease and payment of 50*l.* a month to the proprietors of the gardens. The lessees made an under-lease to the Defendant Blagrove; who became insane: but his wife kept the house open during the season for Vauxhall Gardens, as a house of public entertainment; where all sorts of refreshment and liquors were supplied; so as very materially to interfere with Vauxhall Gardens: above one hundred persons in a night having quitted the gardens, and gone to this house for refreshment, and returned to the gardens afterwards.

The bill therefore, filed by the surviving proprietor of Vauxhall Gardens, prayed an Injunction to restrain the Defendants, their agents, &c. from carrying on this business on these premises.

The Defendants did not appear.

The Attorney General, [Sir John Mitford], in support of the Motion. This application is proper; as according to *Sloman v. Walter* (2) and *Hardy v. Martin* (3), the Court would grant an Injunction, if the Plaintiff should proceed upon the covenant. Besides it would be very hard, that the original lessees should suffer by the conduct of this woman; for her husband is in a state of incapacity.

(1) See the decision upon the appeal, *post*, vol. ix. 554.

(a) See 1 Madd. Ch. Pr. (4th Am. ed.) 162, 163; Eden on Injunct. (2d Am. ed.) 236, *et seq.*; 2 Story, Eq. Jur. § 721; *Bathurst v. Baden*, 2 Bro. C. C. 64.

But where a covenant is of such a nature that a breach of it can only be ascertained by trial in each instance, the Court will not interfere. 1 Madd. Ch. Pr. *ubi supra*. See also *Waters v. Taylor*, 2 Ves. & Bea. 302.

(2) 1 Bro. C. C. 418. See *post*, *Shackle v. Baker*, vol. xiv. 468.

(3) 1 Bro. C. C. 419, n.

LORD CHANCELLOR [LOUGHBOROUGH]. It is in the nature of a specific performance. I think, you will find many cases. The breach of the agreement may consist in repeated acts.

The injunction was granted (1).

WHERE a party to an agreement chooses to rest upon a covenant, if such covenant be broken by the other party, an action for damages is the only remedy, and may frequently be found a very imperfect one. But contracting parties may ascertain between themselves what shall be the damages, from time to time, in case of successive breaches; and unless they are so ill advised as to put the compensation in the shape of a penalty, instead of liquidated damages, they may provide a perfect and absolute remedy. When the whole breach consists in the damage done to the plaintiff, to be compensated by means of an action, a Court of Equity can do no more than decree an issue *quantum damnificatus*: *Shackle v. Baker*, 14 Ves. 469: and it is quite as clear, neither party can, in cases of a similar nature to the present, come to Equity to obtain a specific performance, after they have passively acquiesced under a breach of agreement for a length of time. *Baxter v. Conolly*, 1 Jac. & Walk. 581.

SMITH, *Ex parte*.

[1800, AUGUST 8.]

THE Lord Chancellor cannot upon a petition in lunacy order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by the creditors.

JOHN SMITH, a lunatic, was under his father's will entitled to real estates in fee-simple, subject to debts by mortgage, bond, and simple contract. The bond-creditors * having ex- [*557]hausted the personal estate in part payment of their debts, and a bill being threatened, the petition was presented; praying, that a specific estate might be sold for the payment of the debts. The heir at law and next of kin of the lunatic consented to the prayer of the petition.

Mr. *Alexander*, in support of the Petition.

LORD CHANCELLOR. I cannot make a decree in lunacy; though it is very much to be wished, this could be done: but it must be by bill.

THE evil complained of in the principal case, and again in *Ex parte Dikes*, 8 Ves. 79, has since been remedied by the statute of 43 Geo. III. c. 75, which authorizes the Lord Chancellor, sitting in lunacy, to order the freehold and leasehold estates of lunatics to be sold or charged by mortgage, in order to raise money for the payment of the debts of such persons. The persons of lunatics can be protected only by providing for payment of their debts, it being in the power of any of the creditors of such parties to arrest them. *Ex parte Hall*, Jacob's Rep. 161.

HILLS v. DOWNTON.

[1800, JULY 18; AUGUST 11.]

THE want of a surrender of copyhold estate to the use of the will supplied in favor of a widow against co-heiresses, daughters of the devisor, married, and infant grand-daughters by deceased daughters. The Lord Chancellor was of opinion, that in supplying a surrender the Court is to look only to the object, not to the circumstances of the parties; as, whether the heir has a provision, or not (a)

The ground of supplying the want of a surrender of copyhold estate is a legal or moral obligation, [p. 563.]

ROBERT HILLS by his will as to all his worldly estate both real and personal gave, devised, and bequeathed, to his dear wife Catherine Hills a freehold messuage in Hampton, "and also all those my copyhold messuages or tenements, situate, lying, and being in the hamlet of Hamptonwick, and now in the several tenancy or occupation of Messrs. Bransom, Cope, Sanford, Earl, and Kent, their under-tenants or assigns, (and which I have surrendered to the use of this my will):" to have and to hold the said freehold and copyhold messuages and tenements to the use of her the said Catherine Hills for and during her natural life; provided she should so long continue his widow; and from and immediately after her decease or marriage he gave, devised, and bequeathed, the said freehold and copyhold messuages or tenements unto his grand-children and the survivor and survivors of them; the whole to be equally divided between them, share and share alike, (except his grandson James Downton, whom he totally excluded from any part of the said estate) which shall be then living.

The testator also gave his wife all his money and money in the public funds, and all his plate, linen, china, books, household goods, and furniture, and all other his personal estate and effects of what nature or kind soever, for the sole and absolute use of her, [* 558] her executors, administrators and assigns; *and subject to no condition, restriction or limitation, whatsoever. He gave James Downton 5*l.*, to be paid as soon as conveniently could be after his decease; and he appointed his wife executrix.

The copyhold premises were not surrendered to the use of the will. The bill was therefore filed by the widow to have the want of the surrender supplied.

The co-heirs of the testator at law and by the custom of the manor were issue by a former wife: namely, three daughters, Mary Downton, Ann Ragg, and Frances Powell, and three infant grand daughters, Elizabeth Skynem, Jane Hewitt and Mary Hewitt, by deceased daughters. They were admitted to the copyhold estate; and by

(a) See Sugden, Powers, (4th Lond. ed.) ch. 6, § 1, p. 350, *et seq.*, for a full discussion of this subject. See also *lb.* 727, 728, Appendix; note (a), to *Chapman v. Gibson*, 3 Bro. C. C. (Am. ed. 1844), 222. See also note (2), to that case; *Pike v. White*, *ib.* 286, and notes; 1 Story, Eq. Jur. § 177.

their answers they offered to pay to the Plaintiff, according to her right under the custom, a third of the rents and profits accrued since the testator's death. They also suggested, that she had been a menial servant; and her provision under the will, exclusive of the copyhold estate, was adequate.

The attorney, who drew the will, being examined stated, that he put it expressly, and more than once, to the testator, whether he had surrendered the copyhold estate; saying, if he had not, the devise of the copyhold estate would be void; and that the deponent and one of the other witnesses to the will were customary tenants; and could take his surrender: but the testator said, he had surrendered.

Mr. *Mansfield* and Mr. *Stratford*, for the Plaintiff. Upon the point, whether the Court will not supply the want of a surrender to the uses of the will, where the heir is unprovided for, the cases appear to vary considerably. In *Hawkins v. Leigh* (1) Lord Hardwicke seems to think, the Court will not supply the defect, where the heir is totally unprovided for. The clearest ground, when once the Court assumed this power in favor of creditors, a wife or children, would have been to have laid down the rule generally, without regard to the circumstances, whether the heir was provided for, or not. That must introduce another consideration; whether the heir is sufficiently provided for. In *Pike v. White* (2) Lord Thurlow seems to have considered it as a necessary term, that the * heir is provided for; and the result was, that he supplied [* 559] the surrender. The heir in that case was not a child, but a son grown up, and married, and was provided for by the testator, though not by the will, but by other means. *Chapman v. Gibson* (3), before the Master of the Rolls, is to the same effect. The ground taken by the Master of the Rolls is singular; that, as the heir had a father alive, he could not be considered unprovided for; though he had nothing from the testator, upon whose will the question arose.

This point was much considered in *Brooke v. Gurney*; determined by Sir Thomas Sewell, and upon an appeal by Lord Thurlow. The bill was filed by the widow against the heir. The will was made in 1758. The testator gave all his estates by general words to his wife for life; and, in default of issue of his own body by her, to her in fee. He referred to the will of his father; under whom he derived this estate: that will giving her an estate for life. Sir Thomas Sewell thought the widow entitled to the copyhold estate under the words: but the bill not being filed till 1779, and as she had joined with her son in a conveyance in 1763, which amounted to an admission, that she was not entitled, the Master of the Rolls thought, the length of acquiescence and that circumstance put an end to her right. Lord Thurlow affirmed the decree against the widow, but upon a different ground; being of opinion, that as there was freehold estate to satisfy the words, the copyhold estate

(1) 1 Atk. 387.

(2) 3 Bro. C. C. 286.

(3) 3 Bro. C. C. 229. See Sugd. on Powers, App. No. vi. 550.

would not pass. But neither laid any stress upon the circumstance, that nothing was given to the heir; and I (1) remember, Lord Thurlow expressly treated that circumstance as of no weight. No case has been decided simply upon that ground.

But in this case, supposing this doctrine to prevail, these children, who claim as heirs, have been settled and established in the world; forming no part of their father's family; and one indeed is a widow. Therefore within the true meaning of the phrase they must be considered as children provided for; not like a child, part of the family, and dependent upon the bounty of the father. But what is given to the widow, and what do the children take? She takes an estate for her widowhood; and the reversion goes immediately to them, if the surrender cannot be supplied, as I contend it cannot, for grandchildren (2). They therefore take the fee-simple; she is only provided for as in half the manors of the kingdom, by an estate during widowhood. The children take what can be immediately

[* 560] * turned into money; and therefore cannot come within the description of children unprovided for, so as to prevent the Court from exercising its authority in favor of the widow. Marriage itself is a provision. The daughter passes from the family of her father. She is provided for out of her husband's property; follows his settlement; and does not revert back to the father; being emancipated to all intents. It is an extraordinary circumstance, that the testator states expressly that he had surrendered these copyhold estates. It happens also to be in proof, that he was asked, whether he had surrendered; and he said, he had; and two of the witnesses to the will were customary tenants; who but for that mistake might have immediately taken his surrender.

Mr. *Piggott* and Mr. *Hart*, for the Defendants. Of these Defendants two daughters of the testator are married women: a third is a widow; and there are two grandchildren, infants, by a deceased daughter. The latter at least are unprovided for. These observations upon a provision by marriage do not apply to them. They might be utterly destitute. But, besides that, a child is not always bettered by marriage. The Court will be least of all disposed to exercise their discretion in such a case as this; the case of a second wife, a menial servant of the testator. She takes an absolute, unqualified, interest in all his personal estate; and an estate for life, or widowhood at least, in his freehold; and claims the same interest in these copyhold estates. No doubt, in all these cases, where the copyhold estates are clearly devised, the testator intends them to pass. The declaration therefore of his having surrendered them amounts to nothing; proceeding either from mistake or forgetfulness. It is necessary to consider, how far the Court has gone. The power has certainly been exercised for creditors; upon the principle, that a man should do justice; also for a wife and children: but the Court

(1) Mr. Mansfield.

(2) *Kettle v. Townshend*, 1 Salk. 187; *Perry v. Whitehead*, *post*, vol. vi. 544.

has always done that, according to the *dicta* in all the cases, upon this principle ; that the testator must be taken to mean to fulfil his natural, moral, and legal, obligation. But when obligation is counteracted by obligation, the Court restrains itself ; and does not then supply the defect. I admit, this case simply has not occurred : but in many cases the principle is to be found blended in that principle, which the Court has adopted, as a ground of decision again and again.

* It has been frequently said by Lord Hardwicke, and is [* 561] stated, where the cases have been most considered, as in *Chapman v. Gibson*, a compendium of all the cases, and in Mr. Cox's note (1) which is a correct account of all the cases and the principles established by them, that one of the principles is, that the Court does not act in this case at the expense of an heir not provided for. This is to be found in the early case of *Kettle v. Townsend* (2) ; in which the House of Lords reversed the decree of Lord Somers, supplying a surrender in favor of a grandson. Notwithstanding that, there are most respectable *dicta* of Lord Cowper and Lord Harcourt, to be found in favor of a grand-child (3) ; though there has been no decision since ; the cases certainly not having called for that decision. In *Boss v. Boss* (4) the same principle is to be found against this jurisdiction, where the heir would be disinherited ; the latter part of that case subsequent authorities will perhaps show not to be correct (5). In *Hawkins v. Leigh* and many other cases Lord Hardwicke expressly adopts the limitation, as a general rule, that the heir must be provided for. *Hicken v. Hicken* (6) comes near this case. If Lord Thurlow expressed that opinion in *Brooke v. Gurney*, which is now attributed to him, he certainly had changed it, or did not recollect it, when *Pike v. White* was before him : otherwise the whole argument in that case was time wasted ; if Lord Thurlow was clearly of opinion, that the widow was entitled, whatever was the situation of the heir. Is it fit then, that the Court should overturn this principle ; that the widow cannot call upon the Court ; the obligation to provide for the heir not being performed ? I admit, upon the cases disinheriton is not a proper word : it must be shown, that the heir is not provided for ; and there is a distinction between lineal and collateral heirs. In that respect this would go beyond any case. Even in the late case of *Rumbold v. Rumbold* (7) the principle is admitted ; though your Lordship determined the case upon another point, namely, election. But if this was so clear, your Lordship would not have put it upon that ground, but would have held it a clear case for supplying a surrender. In

(1) 1 P. Will. 60. See also Mr. Fonblanque's note, 1 Treat. Eq. 38, 2d ed. ; and the note, *ante*, vol. iii. 68.

(2) 1 Salk. 187.

(3) See 1 P. Will. 61, and the note.

(4) 1 Eq. Ca. Ab. 124 ; misnamed *Ross v. Ross* ; cited 6 Vin. 238.

(5) See *Cook v. Arnham*, 3 P. Will. 283 ; For. 35.

(6) 6 Vin. 58, 2d ed.

(7) *Ante*, vol. iii. 65.

this case there is nothing to move the compassion of the Court in favor of the Plaintiff; who takes a very competent maintenance under this will; and the Defendants swear by their answer, [* 562] * against which there is no evidence, that they are unprovided for.

Mr. *Mansfield*, in reply. The question, whether the heir is provided for, or not, would bring on all that unfortunate discussion with respect to an illusory provision (1). There is no end of the uncertainty and variety of questions, which this sort of doctrine produces; as, suppose some are well provided for, others not. Except *Hicken v. Hicken* no case applies at all to such a case as this; and that case is very short, and rather extraordinary; for the copyhold estate is supposed to be the whole fortune; and then to prevent the eldest son from losing a temporary provision during the minority of the younger children, the whole provision is taken away from them; and they are left to starve (2). With respect to the grand-children, in *Chapman v. Gibson* the Master of the Rolls takes great pains to find out the true ground of the rule; which he refers to the natural and moral obligation. The law says, a grand-child is not in a situation, from which any natural obligation to provide for him arises; and therefore the Court will not supply a surrender for him. Then a grand-child is not in that state, that, lest a natural obligation, which the law says does not exist, should be violated, the Court is not to supply a surrender for the widow. Upon the cases there is no distinction between lineal and collateral heirs. The whole amount, which this widow will have, is but 47l. a-year.

LORD CHANCELLOR [LOUGHBOROUGH]. I will think of this case. I am surprised at this question being treated as subject to doubt. I thought it a settled point, that a surrender is to be supplied for a wife without regard to the circumstances. The Court began it upon circumstances (3): but I took it to be quite settled, that the distinction as to the consideration of the state of the family had been for the last twenty years completely laid out of the question; for the question really comes to this; whether the heir is rich or poor. I have an idea, that there is some case, that has escaped your industry: not a decision; but, where the language of the Court was, that there must be a plain and precise rule with regard to [* 563] that. I * cannot conceive, that the rule can stand otherwise than thus: if attention is to be paid to the situation at all, it must be, whether there is a provision by the will: but I cannot conceive a rule, that sets you to seek into the circumstances of the heir at law.

Aug 11th. LORD CHANCELLOR [LOUGHBOROUGH]. Upon this

(1) See, *ante*, *Vanderzee v. Adom*, vol. iv. 771; *Kemp v. Kemp*, *post*, 849, and the notes, 853; i. 310.

(2) The Lord Chancellor made a similar observation upon that case, when it was cited.

(3) In *Rumbold v. Rumbold*, *ante*, vol. iii. 65, the Lord Chancellor refers the origin of this Equity to the Statute of Charitable Uses, 43 Eliz. c. 4.

will there is no doubt of the intention ; for the testator describes the copyhold estate minutely ; and takes notice, that he had surrendered that copyhold estate to the use of his will ; which gives it to his wife during her life or widowhood, and after the marriage or death of his wife to his grand-children, excluding one.

His family at his death consisted of his wife, living with him : three daughters ; all, I think, having children ; and three grand-daughters by deceased daughters. The Plaintiff prays, that the want of a surrender may be supplied in her favor. Besides the copyhold estate the will gives her a freehold tenement, also during widowhood, and the personal estate. The daughters and the grand-daughters contend, that, as there is no provision for the heirs at law, the Court will not supply the want of a surrender for the wife.

When the question was first stated in Court, I had conceived, that the object of the devise, and not the comparative circumstances of the devisees and the heir, had formed the consideration, upon which the Court had dispensed with the legal form of the surrender ; and had supplied it, where the object of the devise was to execute a legal or a moral obligation upon the party. The earliest instance is in the case, where the object was the payment of debts. It seems, as far back as one can look into the books, that, where there is a devise for the payment of debts, the Court, without entering into any other consideration but that the object is to perform a duty the testator is bound morally and legally to perform, have supplied the want of a surrender, to subject the copyhold estate to the debts, though a fund not otherwise liable. The Court has established the devise, where the intent was apparent, and nothing was wanting but the surrender ; which at any time might be done, and out of Court : no time, occasion or circumstance, being required to effect it. The justice of providing for a widow or younger children, whose maintenance the father is bound to provide, has * extended [* 564] this beyond the case of creditors ; and though at first there appeared a little hesitation in the Court, there is no decision in fact against it, where it was in favor either of a widow or younger children. The first instance, where the want of a surrender was supplied for children, was, where the children were totally destitute ; where there was no provision for them but that intended by the will. Other cases have occurred, where, though they could not be said to be totally destitute, yet they were insufficiently provided for. I do not go through the cases by name ; as the Master of the Rolls in the case referred to has commented upon all of them. The Court seems in some instances to have taken upon itself to measure the provision, or perhaps to have taken into consideration the circumstances of the widow or children and the heir. But Lord Hardwicke felt the difficulty, which had affected prior Judges ; and very properly thought the father the best judge of the extent of the provision (1). I have not found any case, where it went beyond the family, ex-

(1) *Tudor v. Anson*, 2 Ves. 582.

cept that decided by the Master of the Rolls. That was the case of a nephew and niece; and he held, that the want of the surrender ought to be supplied; and also, that the condition of the heir, there being a provision, no matter how he got the provision, was not to prevent the equity (1).

I confess, it appears to me, there is no rule at all, unless the Court takes it upon the relation in which they stand. Otherwise it is all loose and arbitrary. It never entered into the mind of the Court to consider that argument, where the want of a surrender was to be supplied for creditors: but the same sort of argument might be used there; that the heir was starving, the creditors opulent and severe. Those circumstances are not fit to be considered by the Court. The Court must go upon a certain line, which is very obvious; that, where the will expresses an intention to do that, which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender shall not impede the performance of that duty (2). But I am not under the necessity of taking it to that extent; for I cannot deem these children unprovided for. Supposing that consideration to enter into the question, daughters are provided for, when married. There is no legal obligation upon the father to maintain them. They are out of his family; and have an establishment of their own. It may be good, or bad; but that [*565] is going into the consideration of circumstances. *In the case of co-heirs how is it possible to enter into the consideration, where there is a family of four or five daughters, some rich, some poor, some perhaps thrown back upon the father by the poverty or desertion of their husbands?

Another circumstance is, that some of these co-heirs are grandchildren. Then if the reversal by the House of Lords of Lord Somers's decree, that a surrender might be supplied for a grand-child, is right, I should here decree, that the want of the surrender ought not to be supplied for the widow, because a grand-child is unprovided for, a provision for which grand-child could not according to that determination be a consideration for supplying a surrender. With regard to that case my decree will go no farther than the prayer of the bill: but I have no difficulty in saying, I think of that determination of the House of Lords as Lord Harcourt and other

(1) Upon the question of illusory appointment, another provision from the person making the appointment, not *aliunde*, will justify it. *Kemp v. Kemp*, post, 849; *Bristow v. Warde*, ante, vol. ii. 336. See Lord Alvanley's observations in support of his opinion in *Chapman v. Gibbon*, in the Appendix to Mr. Sugden's Treatise on Powers, No. vi. 550.

(2) With reference to the possible case of an heir in the closest connection with the deviser, and left utterly destitute in favor of his younger brother or step-mother, this should be described as an exertion of power, excusable, perhaps justifiable, under circumstances, rather than as the performance of a duty under any circumstances. Such a disposition for creditors must be distinguished as the effect of a sense of duty, prevailing over natural affection: but even in the former instance these circumstances certainly ought to have no influence in the judgment; which should proceed upon the nature and direct object of the act itself, without regard to consequences.

Judges have done. There is no account of it but that short note in Salkeld, except one, a decree of the Lords Commissioners, that a surrender could not be supplied in that case; and the reasoning is whimsical: Rawlinson says, if that was allowed, the Lords would always be cheated of their fines. Certainly that would not follow; for the Lord would lose nothing of his fine. But upon the Journals of the House of Lords it appears, no one was present upon that occasion, who could know much of the matter: it was not determined by lawyers; and Lord Harcourt speaks of it certainly as not such a decision as he would follow: and one or two other Judges have not treated it with much respect. But I can decree nothing upon this bill, that can have any effect upon that question.

The decree was according to the prayer of the bill.

THE statute of 55 Geo. III. c. 192, renders every disposition of copyhold estates by will effectual, without the necessity of a previous surrender to the uses of the testator's will.

ACHERLEY v. ROE.

[1800, JULY 15, 17.]

UPON possession for many years, the origin of it not appearing, and no title except as *cestuy que trust* under a term to raise a sum of money, the Court would not presume any other title; (a) and therefore decreed the Plaintiff to be let into possession on payment of the charge; but with reluctance; and upon the laches refused an account of the rents even from the filing of the bill. (b)

By indentures, dated the 20th of January, 1704, Richard Acherley, and Ann, his wife, seised of premises in the county of Salop, called Nonely, producing about 40*l.* a-year, for their lives and the life of the survivor, with remainder to Richard Acherley

* in fee, reciting a fine levied of the said lands by Acherley [*566] and his wife to John Pitt and Thomas Steele and their heirs, declared the uses to be to Richard Acherley and his wife for

(a) See *post*, 573 note (a).

(b) Long acquiescence and lapse of time are, by analogy, or in obedience, to the statute of limitations, a bar to a bill for an account. *Baker v. Biddle*, 1 Bald. 394, 418; *Graham v. Torrance*, 1 Ired. Eq. 210; *Parks v. Rucker*, 5 Leigh, 149; *Carr v. Chapman*, ib. 164; *Armilage v. Forbes*, Hayes, 222; *Parrott v. Palmer*, 3 My. & Keen, 632; *Robinson v. Alexander*, 8 Bligh, N. S. 352; *Bird v. Graham*, 1 Ired. Eq. 196; *Ellison v. Moffat*, 1 John. Ch. 46; *Phillips v. Prevost*, 4 ib. 205.

There seems, however, to be no very definite rule on this subject; and each case must depend on the exercise of a sound discretion arising out of the circumstances. *Razner v. Pearsall*, 3 John. Ch. 578. See also *Burton v. Dickinson*, 3 Yerger, 112; *Randolph v. Randolph*, 1 Hen. & Munf. 180; *Botifour v. Weyman*, 1 M'Cord Ch. 161; *Cave v. Saunders*, 2 A. K. Marsh. 64; *Love v. White*, 4 Hayw. 211; *Kingsland v. Roberts*, 2 Paige, 193; *Moers v. White*, 6 John. Ch. 360; *Ives v. Sumner*, 1 Dev. Eq. 338; *Bertine v. Varian*, 1 Edw. 343; *Farnam v. Brooks*, 9 Pick. 212; *Hercey v. Dinwoody*, 4 Bro. C. C. 258.

their lives and the life of the survivor ; remainder to the heirs of the body of Ann Acherley by her said husband ; remainder to the heirs of the body of Ann Acherley ; remainder to John Pitt and Thomas Steele for a term of 200 years ; remainder to Richard Acherley, his heirs and assigns.

The trust of the term was declared to be, that if Ann Acherley should in her life-time, either during her coverture, or afterwards, in case she should survive her husband, by will or any deed or writing dispose of any sum, not exceeding 1000*l.*, and Richard Acherley, his executors, &c. should not pay such money, and perform such will, so as he should not be compelled to pay more than 200*l.* in his life, then the trustees out of the rents and profits of the premises limited to them for the said term, or by sale or demise thereof, should raise so much as Ann Acherley by such will, deed or writing, should limit, give, or bequeath ; and pay the same according to such will, deed, or writing : but in case Richard Acherley should die, and Ann should survive him, and he should by will or otherwise give her a personal estate to the value of 1000*l.*, to be disposed of at her will and pleasure, the term should cease ; and Richard Acherley agreed with the trustees, that his wife should have power to make a will, &c.

Richard Acherley died in 1723, intestate and without issue ; leaving his wife surviving him, who took out administration ; and leaving Thomas Acherley his brother heir at law. Steele, the surviving trustee died in 1736, intestate ; and administration, as far as concerned the trust, was granted to Dickin and Lloyd. Thomas Acherley died in June 1741 ; leaving Richard Acherley Clerk, a lunatic, his eldest son and heir at law ; who died in 1753, leaving Roger Acherley his brother and heir. Ann Acherley died in September 1741, having by her will, dated the 10th of April, 1741, reciting in part the indenture of 1704, and that John Pitt and Thomas Steele were dead, charged the estate of Nonely with 1000*l.* and directed it to be raised pursuant to her power, and to be paid to James Steele and Thomas

Roe ; and she gave the same to them in trust to apply the [*567] interest in the maintenance and education of *all the children of Thomas Roe, that he then had, or might have by his then wife within fifteen years, in equal shares ; and to pay the principal to them, as they should respectively come of age ; with survivorship in case of the death of any under twenty-one ; and in case the persons entitled to the equity of redeeming the said premises should neglect to pay the said 1000*l.* charged, then she gave all her interest, as well in the said 1000*l.* as in the said premises, and the reversion and remainders thereof to the said James Steele and Thomas Roe, and their heirs ; and she appointed them executors.

By a codicil, dated the 12th of July, 1741, reciting the death of Thomas Roe, the testatrix gave to John Corfield and James Steele the said 1000*l.*, charged by her will upon the estate of Nonely, upon the same trusts ; and reciting the death of Thomas Acherley, her brother-in-law, since the execution of her will, she directed his heirs

to surrender a copyhold estate in Leppington, mentioned in her will, to James Steele, his heirs and assigns.

Thomas, Richard, and John, Roe, the three sons of Thomas Roe, died after having attained the age of twenty-one, and been in possession and receipt of the rents of the estate of Nonely.

Roger Acherley after the decease of his brother Richard Acherley Clerk employed John Henshaw an attorney, since deceased, to make application by a letter, dated the 6th of June, 1755, to Humphry Pitt; who was the solicitor of Ann Acherley and son of John Pitt; to inquire what was due. Humphry Pitt by a letter in answer, dated the 4th of July, stated, that he would have sent an answer sooner; but he could not get all the parties to him, who claimed the Nonely estate under Mrs. Acherley's will; that they were all then with him; and said, they would much rather have the whole money due thereon than the estate; and that he would look into the decree, and take an account of what was due upon the estate, and let Henshaw know; expressing his fear, that it was much more than the value of the estate.

Pitt never sent such account, and no farther communication took place. James Steele, the surviving trustee under the will of Ann Acherley, died in 1783. Upon the death of his surviving executor administration of James Steele with the will annexed, as far *as concerned the 1000*l.* given by the will of Ann [*568] Acherley, was granted to Dickin and Lloyd.

Richard Roe by his will, dated the 27th of August, 1765, appointed his brother Thomas and — Higgins executors. The former died soon afterwards; not having proved the will; and the latter renounced. Administration with the will annexed of Richard was granted to John; who by his will dated the 22d of April, 1769, devised the estate of Nonely with part of his estate in Wem to his wife Margaret Roe and — Wells for 1000 years; upon trust to pay annuities to his wife and his daughter Sarah, and to pay the latter 500*l.* at her age of twenty-five or marriage; and after the determination of the term he devised the premises to his son Thomas and his daughter successively in tail; remainder to his wife in fee; and he appointed his wife and Wells his executors.

John Roe died soon afterwards. Administration *de bonis non* of Thomas Roe, the son, was granted to Margaret Roe.

Roger Acherley died in 1784, intestate; and the bill was filed by his only son and heir against Margaret Roe, the widow, and Thomas and Sarah Roe, the son and daughter of Thomas Roe the elder, and against Dickin and Lloyd, the trustees; stating all these circumstances; and that the three sons of Thomas Roe the elder soon after the decease of Ann Acherley by virtue of the term of 200 years by the consent of John Corfield and James Steele and of the representative of Thomas Steele took possession of the premises for the purpose of raising the 1000*l.*; and they continued in possession till their respective deaths; and applied the rents and profits in discharge of the 1000*l.*; and Margaret Roe as executrix of John Roe

soon after his death with the like consent and for the same purpose took possession.

The bill farther stated a suit in the Court of Exchequer instituted in Trinity Term, 12th Geo. I. by Thomas Acherley and his wife and their eldest son against Ann Acherley as administratrix of Richard Acherley, for arrears of an annuity and interest of a sum of 100*l.*, covenanted to be paid by him, and that the said 100*l.* might be laid out in land, and settled; and for a distribution of the surplus of his personal estate. The answer of Ann Acherley to that [*569] *bill set forth the account and the deed of 1704; and submitted, whether the said personal estate was not liable to her demand of 1000*l.*, charged upon the estate of Nonely. An account was decreed in 1728; and afterwards the Report was confirmed; and payment directed in respect of the annuities and 100*l.*; and the bill charged, that Ann Acherley retained the rest of the personal estate in satisfaction of the 100*l.*, charged upon the Nonely estate: and that the whole of it has been long since fully paid and discharged by the rents and profits of the estate of Nonely, or otherwise.

The bill prayed an account of the personal estate of Richard Acherley in the hands of Ann Acherley after the payments directed by the decree of the Court of Exchequer; and that such part as was not applied in such payments, or in a due course of administration, and at least her moiety of the surplus, may be declared to have been retained in part of the 1000*l.*; an account of the rents and profits of the Nonely estate due in respect of the 1000*l.*; and an assignment of the term, and delivery of the premises.

The Defendants Margaret, Thomas, and Sarah, Roe, claimed under the will of John Roe, as absolutely entitled to the estate of Nonely. The answers denied, that the sons of Thomas Roe the elder, or the Defendant Margaret Roe, entered under the term for the purpose of raising the 1000*l.* They stated, that Margaret Roe first became acquainted with her husband in 1753; at which time his brother Thomas was in possession; and, as she understood, as owner; and Thomas Roe, the son, and John Roe having for such a length of time, at least upwards of 40 years, been in peaceable possession, the Defendants insisted upon the length of possession in bar of the relief and discovery.

Upon the death of Thomas Roe, the Defendant to the original bill, who, having suffered a recovery in 1796, by his will in 1797 devised the estate of Nonely among other estates to his mother Margaret Roe and others, whom he appointed his executors, upon several trusts for the benefit of his children, a bill of revivor and supplement was filed against his trustees and executors, and against a mortgagee, claiming under him.

[*570] *It did not appear distinctly, how the Roes got into possession. The evidence for the Plaintiff as to that was merely hearsay, from the information of the deponent's husband and father of Thomas, Richard, and John, Roe having entered upon

the death of Mrs. Acherley. The evidence for the Defendants stated possession of Margaret Roe or her tenants for fifty years; and that about nine years ago one Hill claimed the estate; and gave notice to quit; upon which Margaret Roe said, she never heard of any one claiming the estate except the Acherleys.

The *Attorney General*, [Sir John Mitford], Mr. Cox, and Mr. Bell, for the Plaintiff. The Plaintiff is entitled to the assistance of a Court of Equity; having shown a title to possess the estate against himself, until the sum of 1000*l.* was satisfied. That is a clear *prima facie* title. The Defendants cannot show any title, except under the term of 200 years. There is no doubt, the Plaintiff could recover at law, if the term was expired. A lawful title appearing for that term, your Lordship cannot presume a tortious title. The claim now set up is not under the term, but that by some means the fee-simple is vested in them. They cannot therefore protect their possession under a case, that supposes them not to be in possession under the term. This is precisely the case of an *Elegit*. As to the inconvenience, that was considered by Lord Hardwicke in *Yates v. Hambly* (1); and in another case, where Lord Camden found the inconvenience of directing the account, but, where the interest was clearly redeemable, he directed the account from the time of filing the bill; and the rents to be set against the interest. In this case the Plaintiff will relieve them from the account; for, if they admit, that the rents and profits since the death of Mrs. Acherley have been sufficient to pay the charge of 1000*l.*, and produce the deed of 1704, which are in the knowledge and possession of the Defendants, the Plaintiff may recover at law.

Mr. *Mansfield*, and Mr. *Hart*, for the Defendants, relied on the length of time; comparing it to the case of a mortgage; and insisting, that there was a complete adverse possession from the time John Roe had it. They also contended, that a conveyance might be presumed; and upon the whole, that the bill must be dismissed.

LORD CHANCELLOR [LOUGHBOROUGH]. It is vastly inconvenient * and mischievous to allow a reversioner to lie by, [* 571] and to come after a great length of time, when there must be great difficulty in taking the account, and say, the charge under the term is satisfied. At the same time I do not know how to deal with it. Sometimes in the case of a mortgage the Court is obliged to decree an account; though it is very inconvenient. I shall feel most reluctant in making the decree; and yet it is a very different case from a mortgage. If you can help me to the least ground to make the presumption of a conveyance, I should be very much disposed to make it: but *ex arbitrio* I do not know how; and here I have no ground: nothing but the mere length of time. It sometimes happens, that there is a bolder presumption in a Court of Law; but then the Judge takes the aid of the Jury. I must wait a little to see, if I can conquer my reluctance to make a decree for the

Plaintiff in this cause ; and I will look into the case in Atkins. I cannot disbelieve any part of the evidence. The case made is certainly a true one ; and there has been no dealing whatsoever between the parties except that single transaction in 1755.

Aug. 11th. LORD CHANCELLOR [LOUGHBOROUGH] having particularly stated the case, proceeded thus :

This bill is filed to redeem a term of years, created by a voluntary settlement, after a possession by the Defendants and those they represent of fifty-three years, and also several years after the commencement of the Plaintiff's title. Certainly no demand can be more unfavorable ; and with great reluctance I feel myself compelled by the singular circumstances of the case to entertain such a suit. It must now be taken for granted, either that Ann Acherley had not received any personal estate applicable to the charge of 1000*l.* or, that the Court of Exchequer was of opinion, that what she took as administratrix or as next of kin was not applicable ; the condition expressing, that her husband should by will or otherwise give her that sum. She never barred the remainder ; though, her estate being in tail, it was in her power to bar it. In what precise manner the possession of the estate subject to the charge of 1000*l.* was transferred to the Roes does not now distinctly appear : but it is fully proved, that the rents of the estate, which did not exceed the interest of the charge at 4 per cent., were received by the mother on their [* 572] behalf ; and, after they were of age, * they enjoyed the rents in the same proportions as they had the interest of the charge. It could not be raised ; for the estate was not worth more. It was exactly equal to the family, whether they let it go on, as it was held, or had a sale. The three brothers continued to receive the rents. Upon the death of Richard his brother Thomas was one of his personal representatives. He died. The surviving executor renounced ; and John the surviving brother became the representative of both his deceased brothers. He therefore was entitled in all these characters to all the interest and the capital of the charge of 1000*l.* It appears by the bill, that there was an inquiry, the only one, of which there is any account given, in 1755, two years after the death of the lunatic heir at law ; the Plaintiff's father, having then become heir at law, employing an attorney to write to the son of the attorney, who had been employed for Mrs. Acherley in the suit in the Court of Exchequer. The inquiry was to know, what was due upon the charge, and to treat for a redemption. The answer was, that the parties would rather have the money than the land ; that he would look into the decree ; and let the other know what was due. I take this, as it is stated by the bill. It is the only inquiry the case suggests ; and the result I take rather as a circumstance, that bears against the Plaintiff ; from the neglect of his father to pursue his right ; when he was fully apprised of it. His negligence ought to avail the Defendants as far as it possibly can. It may be of considerable advantage in the sequel : but still all the

evidence before me is distinct and clear as to the nature of the title ; from the circumstance of the three sons of Thomas Roe being entitled and possessing in that manner ; upon which I lay little stress ; though undoubtedly it deserves considerable attention : next, upon the language and conversation of the people. It happened, that the same tenancy continued. The interest of the tenant in possession in Mrs. Acherley's time passed to his son-in-law ; and in the family of those tenants it was always understood to be in Mrs. Acherly ; though the Roes possessed. Upon all this evidence there is nothing but neglect ; and I cannot from the manner, in which they talked of it themselves, raise any presumption, that they have any right to the estate except under that deed ; which clearly gives the estate to the Plaintiff, paying a sum of money.

It was argued, that it was to be considered as a mortgage. But a proper mortgage is totally different. There is a security upon *contract between the parties ; and the mortgagor [* 573] in the deed covenants to pay at a certain time ; and in default of payment by his express covenant and the effect and operation of the deed at law the estate vests absolutely in the mortgagee. There is the estate therefore. A legal title is gained. It is absolutely at law ; and it is only by the indulgence of this Court, limited in point of time, that the redemption is kept open (a). In this case there is nothing but possession. These Defendants have no estate, but a mere possession. As being entitled to the interest of the money they were let into possession of the rents. The term is not in them. They have no legal title. The term is in the trustee (b). There-

(a) See 2 Story Eq. Jur. § 1520 ; *Trash v. White*, 3 Bro. C. C. (Am. ed. 1844), 291, notes. If the mortgagee gets into possession and continues in possession twenty years without any acknowledgment of the mortgage title, the mortgagor is barred of his redemption. *Gates v. Jacob*, 1 B. Monroe, 308 ; *Hatfield v. Montgomery*, 2 Porter, 58 ; *Phillips v. Sinclair*, 20 Maine, 269 ; *Demarest v. Wynkoop*, 3 John. Ch. 129.

But an acknowledgment of the mortgage title within twenty years before filing the bill for redemption maintains the equity of redemption. *Hodde v. Healey*, 6 Madd. 181 ; *Rayner v. Castlee*, ib. 274.

As where the mortgagee has treated it as a mortgage by keeping accounts and in other ways. See *Slee v. Manhattan Co.*, 1 Paige, 48 ; *Fenwick v. Macey*, 1 Dana, 279 ; *Hughes v. Edwards*, 9 Wheat. 489 ; *Dexter v. Arnold*, 3 Sumner, 152 ; *Edzell v. Buchanan*, 3 Bro. C. C. (Am. ed. 1844), 254, 256. The time is to be computed from the last period at which the parties treated the transaction as a mortgage. *Sheppard v. Murdock*, 3 Murph. 218. See also cases cited above.

(b) In case of a direct trust, no length of time bars the claim between the trustee and *cestui que trust*. *Cook v. Williams*, 1 Green. Ch. 209 ; *Wedderburn v. Wedderburn*, 2 Keen, 749 ; *Baker v. Whiting*, 3 Sumner, 476 ; *Armstrong v. Campbell*, 3 Yerger, 201 ; *Overstreet v. Bate*, 1 J. J. Marsh. 370 ; *Coster v. Murray*, 5 John. Ch. 224 ; *Gist v. Cattell*, 2 Desaus. 53 ; *Thomas v. White*, 3 Litt. 177 ; *Stephen v. Yandle*, 3 Hayw. 221 ; *Trecothick v. Austin*, 4 Mason, 16 ; *Turrill v. Murry*, 4 Yerger, 104 ; *Wiesner v. Barnet*, 4 Wash. C. C. 631 ; *Bryant v. Packett*, 3 Hayw. 252 ; *Fisher v. Tucker*, 1 McCord Ch. 169 ; *Van Rhyne v. Vincent*, ib. 314 ; *Decouche v. Savetier*, 3 John. Ch. 216 ; *Wamburzec v. Kennedy*, 4 Desaus. 474 ; *Pierson v. Ivey*, 1 Yerger, 297 ; *Turner v. Debell*, 2 A. K. Marsh. 384 ; *Bigelow v. Bigelow*, 6 Ham. 97 ; *Kane v. Bloodgood*, 7 John. Ch. 90 ; *Cholmondeley v. Clinton*, 2 Meriv. 93.

With respect to the general disinclination of Courts of Equity to aid stale de-

fore if the Plaintiff chooses to prosecute his right, I must hold him entitled under the circumstances. But I am bound to add in favor of the Defendants, that the neglect is so strong, that undoubtedly I shall decree no account, for the purpose of ascertaining, whether the rents are so improved as to have sunk the principal of the money. The estate was in so many different hands, and there have been so many changes of title, and fair changes, the parties acting upon the idea, that they were owners, that I shall decree no account: but I am bound to hold, that the 1000*l.* is due. I will not even carry it back to the filing of the bill (1).

Declare, that upon payment of the 1000*l.*, with interest from the decree, and all the costs of the cause, the Plaintiffs are to be entitled to be let into possession; and that the representative of the surviving trustee shall assign the term to the Plaintiff: the Defendants accounting for the rents only from the decree.

The Lord CHANCELLOR added, that he was very ready to send it to be tried at law, if the Counsel for the Defendants thought, the law would give them any greater advantage: but his Lordship observed, that it could not be sent to law without saying something about the term.

The Counsel for the Defendants did not desire to go to law.

As to the strong disinclination of Courts of Equity to listen to stale demands, where the party complaining has slept upon his rights for a great length of time; see, *ante*, note 2 to *Jones v. Turberville*, 2 V. 11: and that the policy of the Statute of Limitations applies as strongly to a mortgaged estate as to any other; see note 3 to *Edsall v. Buchanan*, 2 V. 83.

[* 574]

WACKERBATH, *Ex parte*.

[1800, AUGUST 11.]

ACCEPTOR for the honor of the drawer of a bill originally accepted by the bankrupts, having taken up the bill, ought, if the bankrupts had no effects in their hands, to resort first to the drawer. Therefore, though his proof was permitted to stand, the dividend was restrained for an inquiry, whether the bankrupts had effects; and if not, whether the person, who so took up the bill, had effects of drawer at the time or since. (See note (1), p. 575.)

KEECKHOEFFER and Co. of Hamburg, drew three bills for 800*l.* 700*l.* and 600*l.* upon Cox and Heisch of London, payable three

mands, see *Deloraine v. Brown*, 3 Bro. C. C. (Am. ed. 1844) 633, 645, 646 and notes; *Benzin v. Lenoir*, 1 Car. Law Repos. 508; *Breckenridge v. Churchill*, 3 J. J. Marsh. 15; *Frame v. Kenny*, 2 A. K. Marsh. 146; *Coleman v. Lyne*, 4 Rand. 454; *Shower v. Radley*, 4 John. Ch. 316; *Coxe v. Smith*, *ib.*, 271; *Phillips v. Belden*, 2 Edw. 1; *Prescott v. Hubbell*, 1 Hill Ch. 213.

(1) As to the limitation of accounts see *ante*, *Drummond v. The Duke of St. Albans*, 433, and the note, 439; and as to the effect of laches, the note, vol. ii. 15.

months after date; which were accepted; and became due upon the 25th of September 1799. Upon the 13th of September Cox and Heisch stopped payment, and committed acts of bankruptcy; and on the 23d of September a commission issued against them. The bills being protested by the holders for better security, Christin and Bowen, the correspondents of the drawers, accepted the bills for the honor of the drawers; and when due, payment being refused upon their being presented at the bankrupts', they were taken up by Christin and Bowen. The drawers were indebted to the bankrupts in a large sum, much more than the amount of the bills. Christin and Bowen were holders of another bill drawn by the bankrupts and accepted by Schult. Upon the 24th of June, 1800, they applied to prove under the commission; including 2150*l.* paid on taking up the said bills for the honor of the drawer.

The assignees resisted the claim; on the ground, that they ought to resort to the drawers for payment; especially as the drawers could not themselves have proved the bills, if in their possession; and also, that, if the bills had been sent back to the drawers at the time they were protested for better security, they would have been immediately taken up by the drawers; who did not stop payment till the 28th of September.

The proof being admitted to the full extent of the claim, the petition was presented by the assignees; praying, that the sum of 2150*l.* may be expunged; and that the proof may stand only for the sum of 662*l.* 9*s.* 8*d.*

On a former day it was proposed, that this question should be tried at law: but the Lord Chancellor said he would consider of it.

LORD CHANCELLOR [LOUGHBOROUGH]. I have talked to one or two persons in trade upon this; who answered, that the persons accepting for the honor of the drawer have a right to come upon the acceptor (*a*). I *put the case that the [*575] drawer had no effects in the hands of the acceptor. The answer is, they accept for the honor of the drawer: but they accept an accepted bill. The justice of the case is, that, if there were no effects, they should go in the first place against the drawer; but they should not be altogether without remedy. Therefore I propose to order, that the proof shall stand; but they shall not receive a dividend, except upon 662*l.* 9*s.* 8*d.*, until an inquiry has been had, whether the drawers had effects in the hands of the bankrupts Cox and Heisch, and if no effects, then an inquiry, whether Christin

(*a*) See 3 Kent (5th ed.) 87, and note. Story, Bills of Exchange, § 256, § 124; Chitty, Bills, (10th Am. ed.) 344, 352, 509, *et seq.*

The acceptor of a bill of exchange for the honor of the drawer, cannot maintain an action thereon against him, without proof of its presentment to the drawee, and non-acceptance or non-payment by him, and notice thereof to the drawer. *Baring v. Clark*, 19 Pick. 220. See *Wood v. Pugh*, 7 Ohio, 164; *Williams v. Germaine*, 7 Barn. & Cres. 468.

and Bowen had effects of the drawers at the time; and whether any have since come to their hands (1).

THE principal case was disapproved by Lord Erskine, C. in *Ex parte Lambert*, 13 Ves. 179: that disapprobation, however, seems only to have gone to the rule alleged in the principal case to be the understanding of mercantile men, namely, that if the first acceptor of a bill of exchange become a bankrupt, the party who subsequently accepts such bill, for the honor of the drawer, accepts an *accepted* bill; from which it seems to have been inferred, that as to the second acceptor's right to prove against the bankrupt's estate, it was immaterial whether the original acceptor had, or had not, ever any effects of the drawer. In *Ex parte Lambert*, it was determined, that if a bill, after being accepted, is dishonored, and then taken up by a third party, for the honor of the drawer, such person has merely a right to stand in the place of the drawer, as against the acceptor, and cannot make a title stronger than that of the drawer; consequently, can have no right to prove against the estate of the acceptor, who had not in his hands any effects of the drawer. It may be observed, that when, after a refusal by the drawee to accept a bill of exchange, a third person accepts it, for the honor of the drawer, or of the first indorser, a second presentment to the drawee is necessary at the time when the bill becomes due; and if he then persist in dishonoring the bill, a regular protest must be made, and notified to the collateral acceptor, or the holder of the bill cannot recover its amount against him. *Hoare v. Cazenove*, 16 East, 394.

PARRY, *Ex parte*.

[1800, AUGUST 11.]

UPON a separate commission of bankruptcy the benefit of an insurance effected by the bankrupt upon his own account on a ship, of which he was joint-owner, is not liable to the joint creditors.

MARTIN, Cullen, and Buddison, of Liverpool, were joint-owners of the ships *Maria* and *Betsey*; which sailed to Africa upon slave-voyages. The ships were fitted out at the joint expense and risk of the owners. The petitioners had supplied goods to furnish the cargoes to the amount of 1500*l*. Previously to the sailing of the ships Martin effected insurances upon his own account and in his own name to the amount of 2200*l*. upon the *Maria*, and 150*l*. upon the *Betsey*. In July 1799 the *Maria* was captured. In February 1800 a separate commission of bankruptcy issued against Martin; and afterwards a commission issued against Cullen. The other ship was, when the petition was heard, upon her voyage to the West Indies.

The petition prayed an account of the insurance effected by Martin upon the *Maria*, and which shall be paid to his assignees, and also of what shall be remitted to England on account of the *Betsey*; an account of the debts due to the petitioners in respect of the outfit and cargoes of the said ships; and that the produce of the insurance upon the *Maria* and of the voyage of the *Betsey* may be

(1) This case seems over-ruled by Lord Erskine, *Ex parte Lambert*, *post*, vol. xiii. 179; holding, that a person, taking up a bill for the honor of the drawer, has no right against the acceptor without effects.

applied in satisfaction of the debts due to the petitioners in respect of the outfit and cargoes; and that the petitioners may be admitted to prove for that purpose.

Mr. *Richards*, in support of the petition. These persons were jointly concerned in the ships. In the bankruptcy of Fitzhenry * and Rogers the case was, that the former had [*576] effected an insurance upon his share of the ship; which took some prizes; and was afterwards lost. The object of the petition by the separate creditors of Fitzhenry was the produce of the cargo and the prizes and the money received on the insurance: but the order was that they should be deemed the joint property of Fitzhenry and Rogers, and be distributed among the joint creditors.

Lord CHANCELLOR [LOUGHBOROUGH]. Certainly the cargo and prizes were joint property: but if the order extended to the money paid on the insurance, it was wrong. The bankrupt could have no contribution from the other joint owners for the premium he paid for the insurance. Though jointly concerned in the adventure, one may think fit to insure, the other, not (1).

THE doctrine of the principal case was followed in *Ex parte Browne*, 6 Ves. 136.

MUTRIE, *Ex parte*.

[1800, AUGUST 11.]

A COMMISSION of bankruptcy on residence abroad, where the departure from the realm was for a fair and proper purpose, and not with a view of defrauding creditors, the trade continued by a partner, and the petitioning creditor's debt subsequent, superseded.

DYDE and Scribe, warehousemen in Pall Mall, had in 1796 accepted a bill for 100*l.*; which was discounted by the petitioner Mutrie. The bill, which was due on the 11th of March, 1797, was never paid. Upon the 10th of March, 1797, Dyde and Scribe by deed assigned all their stock in trade, book-debts, and property to trustees for the benefit of their creditors. No application was made to Mutrie, and the trustees under the deed refused to pay him a dividend. Immediately afterwards, in March 1797, Scribe went abroad for the purpose of transacting his business, not of avoiding his creditors: but he did not return to England. In 1798 Dyde under the firm of Dyde and Scribe bought goods of the petitioner William Justice to the amount of 150*l.* In the same year he contracted a debt of 150*l.* with Colman and Weldon; and in 1799 he was thrown into prison by several creditors for debts, all contracted by himself, after Scribe had gone abroad. In the same year Dyde assigned all his property to Coleman and Weldon and Carruthers, in

(1) *Ex parte Browne*, *post*, vol. vi. 136.

trust for themselves and the rest of his creditors, without the privity of Scribe. Coleman and Weldon executed the deed; accepted the trust; and took possession of the effects assigned. The petitioners attached money of Dyde and Scribe in the hands of Coleman and Weldon; who took out a commission of bankruptcy against Dyde and Scribe, as residing in St. Paul's Church-yard. About [* 577] *eighteen months ago Dyde went abroad; and has resided ever since at Hamburg.

The Commissioners refusing to hear a state of facts on behalf of the petitioners, they presented the petition; that the commission may be superseded at the expense of the petitioning creditors Coleman and Weldon.

The grounds stated by the petition were, that Scribe having gone abroad to transact his own business, and not to avoid his creditors, his continuance abroad cannot be construed an act of bankruptcy to support a commission upon a debt contracted by Dyde under the firm of Dyde and Scribe in St. Paul's Church-yard; though Scribe never resided there, and Dyde did not trade or reside there till long after Scribe had gone abroad; that the commission was taken out to defeat the attachment; and that Dyde, since he went abroad, had large dealings with Coleman and Weldon.

When Scribe went abroad, no debt was due by him and Dyde to the petitioning creditors. It was proved, that the clerk went over to him in Holland; and communicated to him the insolvent state of the house and the debt due to Coleman and Weldon; upon which he said he should not return.

Mr. Cooke in support of the petition cited *Fowler v. Padget* (1).

Mr. Mansfield, for the Assignees. The case of *Fowler v. Padget* has been supposed to over-rule the two prior cases (2); but proceeding upon the want of intention it does not over-rule them; and Mr. Justice Lawrence distinguishes them. Here there is evidence of a positive intention in Scribe to delay his creditors. This is an act of bankruptcy within the Statute of Elizabeth (3). The words of that statute "otherwise absent himself" certainly do not mean departing the realm; for that is particularly taken notice of. It is therefore a general expression, applying to neither of the two pre-

(1) 7 Term Rep. B. R. 509. That case, as far as it seems to require the actual delay of a creditor, and *Barnard v. Vaughan*, 8 Term Rep. 149, are over-ruled: *Ex parte Dakeyne*, in bankruptcy, before Lord Eldon, 14th November, 1801. *Post, Wydown's Case*, vol. xiv. 80; *Ex parte Bamford*, xv. 449; xvi. 149, 150; *Williams v. Nunn*, 2 H. Bl. 334; *Robertson v. Liddell*, 9 East, 487; *Bayly v. Schofield*, *Chenoweth v. Hay*, 1 Maul. & Selw. 338, 676; *Lloyd v. Heathcote*, 2 Brod. & Bing. 338; 5 J. B. Moore, 129; *Lozarus v. Wailhman*, 5 J. B. Moore, 313; *Harvey v. Ramsbottom*, 1 Barn. & Cres. 55; by which it is settled, that actual denial or delay is not essential to the acts of bankruptcy by beginning to keep house, departing from the dwelling-house, or otherwise absenting himself, with intent to delay a creditor; as it had been held to be to the first of those acts in *Garret v. Moule*, 5 Term Rep. 575.

(2) *Woodier's Case*, Bull. N. P. 39; *Raikes v. Poireau*, Cooke's Bank. Law, 73, 4th ed.; 8th ed. 85.

(3) 13 Eliz. c. 7, s. 1.

ceding particular descriptions; and it must apply to something more intended by the Legislature than going out of the realm. The continuance there to defraud his creditors is therefore absenting himself.

* Lord CHANCELLOR [LOUGHBOROUGH]. The difficulty [* 578] of that construction is, that I do not know what date to give to the act of bankruptcy. A man goes out of the kingdom with a fair intention, and for a proper purpose. That, it has been long determined, will not be an act of bankruptcy, though creditors are delayed. Then he continues abroad, after debts are contracted by his agent. From what date is he to be considered a bankrupt? How will you connect the act of bankruptcy with the posterior debt? I do not think this commission can be supported (1).

A TRADESMAN's departure from the realm, and the consequent delay which some of his creditors may suffer, is not an act of bankruptcy, without proof, or necessary inference, that the departure was with an intent, at the very time, to delay creditors. *Ex parte Osborne*, 2 V. & B. 179, and see, *post*, the note to *Ex parte Richardson*, 14 Ves. 184.

(1) From Lord Eldon's language, 1 Rose, 151, *Ex parte Hague*, it seems, that remaining abroad with intent to delay a creditor was an act of bankruptcy. Many commissions have proceeded upon such an act; and it surely cannot be maintained, that a trader, who on his return to England, being informed, that an officer is waiting at Dover to arrest him, remains at Calais on that account, does not fall under the description of bankrupt by absenting himself; to whom the rule, that an act of bankruptcy cannot be committed out of England, is not applicable. The statute 6 Geo. IV. c. 16, s. 3, passed since the former part of this note was written, makes this a distinct act of bankruptcy.

IN THE MATTER OF BANKRUPTCY.

LORD CHANCELLOR.

[1800, August 12.]

GENERAL Order, that in a Country Commission two Barristers resident near the place be inserted in the list of Commissioners; and no Quorum Commissioner, unless a Barrister.

WHEREAS, by the practice which hath many years prevailed, the Solicitors, on suing out Commissions of Bankrupt to be executed in the country, have been at liberty to name their own Commissioners to execute the same; two of whom are nominated Esquires, and are considered to be Barristers, resident at or near the place where the said commission is to be executed, and also to three solicitors or attorneys: AND WHEREAS it appears, that in many instances, improper persons have been named in such commissions as the Quorum Commissioners, they not being Barristers; which is contrary to my intent and meaning,

I DO THEREFORE ORDER, That in future the Solicitors, in delivering to my Secretary of Bankrupt the names of the Commissioners to be inserted in the commission applied for by them, do insert in such list the names of two Barristers, resident at or near to the place where such commission is to be executed; and that, on no account, they do insert the name of any gentleman to be nominated as a Quorum Commissioner unless he be a Barrister.

LOUGHBOROUGH, C.

PARSONS v. PARSONS.

[ROLLS.—1796, JULY 9; 1800, AUGUST 13.]

A CONTINGENT legacy failed; the event, which happened, not being provided for; and no necessary implication in favor of the legatee. (a)
The Court of King's Bench refused to answer a case from the Rolls, stated as a trust, [p. 578.]

WILLIAM COLE by his will bequeathed to his executors 1600*l.* 3 per cent. consolidated Bank Annuities; in trust to pay the interest, dividends, and profits, thereof, as the same should from time to time become due and payable from the time of his decease, unto Isabella Henwood, then residing with his wife Mary Cole, until three months next after the decease of his said wife; and in case the said Isabella Henwood should be then living, and should have attained the age of twenty-one years, then in trust to pay, transfer and assign, the said 1600*l.* 3 per cent. Annuities unto the said Isabella Henwood to and for her own proper use and benefit, together with all such arrears of interest, dividends and profits, as should or might be due thereon: but in case the said Isabella Henwood should happen to depart this life before the end of three months next after the decease of his said wife Mary Cole under the age of twenty-one years and unmarried, then and in such case he directed, that the said legacy of 1600*l.* 3 per cent. Annuities should sink into and become part of the residue of his personal estate; and in case Isabella Henwood should survive his said wife, and at the time that she should become entitled to a transfer of the said Bank Annuities she should be married, then he directed, that his executors should pay, &c. the said 1600*l.* unto such person and persons, and for such ends, intents and purposes, as she should notwithstanding her coverture by any deed or deeds, instrument or instruments in writing, executed in the presence of two or more witnesses appoint: so as the same might be received and enjoyed * by her and her children, if any, free from [*579] the debts, control, or engagement, of any husband she might happen to marry: for which purpose he directed, that the receipt and receipts, appointment and appointments, of the said Isabella Henwood alone should from time to time notwithstanding such coverture be sufficient discharges to his said executors and trustees to all intents and purposes whatsoever, without her husband joining therein; and in case the said Isabella Henwood should happen to

(b) 2 Williams, Executors, (2d Amer. ed.) 879, *et seq.* 912; *Humberstone v. Stanton*, 1 Ves. & Bea. 384; *Williams v. Jones*, 1 Russ. 517; *Baker v. Hanbury*, 3 Russ. 340; *Toldervey v. Colt*, 1 Mees. & Wels. 250; S. C. 1 Younge & Coll. 240; *Doo v. Brabant*, 3 Bro. C. C. (Am. ed. 1844) 393, 399, and note (b) and cases therein cited; *Scott v. Chamberlayne*, *ante*, 3 V. 302.

But a contingent interest in real and personal estate may so vest, that it will go to the real and personal representatives of the person interested, if he dies before the happening of the contingency. If it were uncertain in whom the estate is to vest until the contingency happens, the case might be different. *Winslow v. Goodwin*, 6 Metcalf; S. C. 7 Chandler, Law Reporter, 181-183.

depart this life, before she should have attained the age of twenty-one years, leaving lawful issue, then he directed, that his executors, &c. should transfer, assign, set over, and divide, the said sum of 1600*l*. Bank annuities or the produce thereof unto and among all and every the child and children of the said Isabella Henwood lawfully begotten, who should be living at the time of her decease, share and share alike, if more than one; and if but one, unto such only child. But in case any of the said children should happen to depart this life before the age of twenty-one years, then he directed, that the share or shares of him, her, or them, so dying, should belong to and be equally divided between and among the survivors or survivor of him, her or them, so dying. He gave all the rest, residue, and remainder, of his personal estate and effects to his three executors and Isabella Henwood, their heirs, executors, administrators and assigns, for ever.

Isabella Henwood after the testator's death married Robert Parsons. She attained the age of twenty-one in 1789; and she and her husband in her right received the dividends of the stock till her death in 1795. The testator's widow survived her.

The bill was filed on behalf of George Parsons, the only child of Robert and Isabella Parsons, an infant; praying, that the Plaintiff may be declared entitled to the legacy of 1600*l*. 3 per cent. Consolidated Bank Annuities, with the dividends from the death of his mother.

The Defendants, the surviving executors, and the personal representatives of one who was dead, claimed the stock, as having in the event, that happened, fallen into the residue.

Mr. *Graham* and Mr. *King*, for the Plaintiff. Though the precise event described, viz. the death of Isabella Henwood under [*580] the *age of twenty-one, leaving issue, has not happened, yet there have been many cases, in which the particular expressions of the will have given way to the manifest general intention; which upon this will was to provide for Isabella Henwood and her children. The stock was to sink into the residue in one event only: the death of Isabella Henwood before the end of three months after the death of his wife under the age of twenty-one and unmarried. From that an implication arises, that, if she should marry and have issue, it should not sink: *Jones v. Westcombe* (1). *Statham v. Bell* (2). The contingency, upon which the interest of Isabella Parsons depended, viz. her surviving the testator's wife three months, did not extend to her children. The cases of *Doo v. Brabant* (3) and *Calthorpe v. Gough* (4) will probably be cited for the Defendants. In these cases the testator contemplated an event, in which the person, who was to take in the first instance, might have the absolute property and the disposition of it. He did not look to the event,

(1) Pre. Ch. 316; 1 Eq. Ca. Abr. 245.

(2) 2 Cowp. 40.

(3) 3 Bro. C. C. 393.

(4) 3 Bro. C. C. 395, in a note.

that did happen. *Doe v. Applin* (1) is a very strong authority for rejecting particular limitations in favor of the general intention.

Mr. *Lloyd*, for the Defendant. There is no clear intention upon this will, that the children should take any interest, except in the event mentioned. It is much safer to abide by the words of the will. The bequest to Isabella Parsons and her children depends on one and the same event; an event which never happened; and the words are so strong, that they must control the construction; and the Court cannot reject them; as in the case of any other uncertain event, which is to have the effect of a condition precedent (2), as marriage: *Atkins v. Hiccocks* (3). This is directly within what the Court laid down in *May v. Wood* (4) as to the necessity of the condition taking place, where it is intended. *Doe v. Applin* does not apply to this case; for that was upon a question, whether the ancestor took an estate for life or in tail; and the construction was in favor of the latter to effectuate the general intention. In *Denn v. Bagshaw* (5) the Court did not think themselves at liberty to depart from the words.

But there is a preliminary question in this cause; which stands in the way of the rights of all parties. The capital of this * stock is not to be paid to any one until the expiration of [*581] three months after the death of the testator's widow. She is still living. How therefore can the capital be claimed?

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] mentioned the case of *Crowder v. Clowes* (6).

After the argument this case was sent to the Court of King's Bench: but in consequence of its being stated as a trust that Court refused to answer it (7). Upon the 13th of August, 1800, it was set down for judgment.

Aug. 13th. The MASTER OF THE ROLLS. This case has been a great while before me. It was first sent to the Court of King's Bench; and that Court in consequence of the fund being stated to be in the hands of trustees refused to answer it; and since that time it has stood for judgment. It is one of those cases, in which, as Lord Kenyon observed upon *Denn v. Bagshaw*, I find my wishes in opposition to what I am bound judicially to decide. I have been very desirous, that I could upon judicial grounds raise an implication of what certainly is not expressed; that either the child of Isabella Parsons, or she herself, took a vested interest in this fund: but upon great consideration I am under the necessity of determining, that no interest vested either in her or her child. This is almost exactly the case of *Doo v. Brabant*. It is true, when that case was first before

(1) 4 Term Rep. B. R. 82.

(2) See *Bolger v. Mackell*, ante, 509.

(3) 1 Atk. 500.

(4) 3 Bro. C. C. 471.

(5) 6 Term Rep. B. R. 512.

(6) *Ante*, vol. ii. 449.

(7) *Bayley v. Morris*, ante, vol. iv. 788.

Lord Thurlow, his Lordship seemed to entertain considerable doubts upon my decision in *Calthorpe v. Gough* : but I rather think, that case was not sufficiently stated to him ; for it was not near so strong as *Doo v. Brabant* ; which Lord Thurlow sent, after intimating a strong opinion upon it, to the Court of King's Bench : but that Court dissenting from that opinion, his Lordship decided according to *Calthorpe v. Gough*. That case admitted of none of the inferences, that might have been made in the other. It was clear, nothing was intended to vest in the children but what Lady Gough had a complete power to dispose of ; and I have been since informed, that knowing the will of her brother, who became a lunatic, she actually exercised that power ; and though it lapsed, that is an event nine times in ten not foreseen by the testator ; who probably, had he foreseen it, would have provided accordingly.

[* 582] * Upon the words of this will it is very difficult to know, how the circumstance of the legatee's surviving the testator's wife was material to vest the fund in the legatee. But it is expressly so ; and then it is not given at all events after the death of his wife ; but if the legatee shall be then living, and shall have attained the age of twenty-one. So there could be no vested interest in her till after the death of the testator's wife ; but if she should be then living, and should have attained the age of twenty-one, she was to acquire the absolute interest. It is very unfortunate, that the testator has left unprovided for the event, that has happened. She did not survive the wife : but she attained the age of twenty-one, married, and has left a child ; and the question is, whether there was any vested interest whatever, either in her or her child. In principle it is almost the case of *Doo v. Brabant*.

The case of *Denn v. Bagshaw* undoubtedly revolts the feelings of any man sitting in judgment ; provided he is at liberty to indulge them in any thing beyond necessary implication. Nothing could be more repugnant to what must be supposed the will. In that will, as in this, the surviving the testator's daughter was made a condition, upon which the grandson should take ; though it cannot be conceived, that merely because he did not survive his mother, though he should have issue, they should be defeated. It was strongly contended, that the words " if living at the time of her death " could not prevent the heir male from taking ; but that it was to be considered as if those words were not in the will ; and that an estate tail was intended. All the Judges were of opinion, there was every reason to infer, that that circumstance was not intended as a condition ; but, that it was not a necessary and unavoidable implication. That is the situation, in which I now find myself. I have been disposed, and have endeavored, as far as possible, to persuade myself to make this inference : but, as I observed in *Holmes v. Cradock* (1), I cannot indulge speculations ; where the intention is not manifest to give the legacy in the event, that has

(1) *Ante*, vol. iii. 317.

happened. I will let those feelings operate as far as the will permits me: but the inferences must be fair, and necessarily resulting from the will (1) (a).

There is a case, *Mackell v. Winter* (2), that went upon an appeal from my decision before the Lord Chancellor; who reversed my decree in part. I have looked at that case with a great desire, if * possible, to have justified myself in doing [* 583] what I wish to do now: but upon great consideration of that case I think, it does not warrant me in indulging that desire upon this case. The Lord Chancellor differed from me upon the point, whether there was a vested interest. First, his Lordship thought, there was a gift of the interest only, and no vested interest in the capital until the age of twenty-one. In that the Lord Chancellor differed from me. That being so determined, I should be inclined to concur upon the next point; that by necessary inference a limitation in the nature of cross-remainders between the grandsons and the grand-daughter was to be implied. I have endeavored to apply the reasoning of that case to this. But the case now before me is this. For some reason the testator made the surviving his wife three months a condition of Isabella Henwood's taking an absolute vested interest. Why he did so, no one can tell. He directs, that this stock shall sink into the residue in the event of her death before that time, under the age of twenty-one, and unmarried. I wished to consider it vested at the age of twenty-one, whether she survived the wife or not: but so far from that, he again takes up the consideration of her surviving his wife; giving her a power to dispose of it independent of her husband: and then stating the case of her dying under the age of twenty-one, leaving issue. If the case had been put to the testator, he would have said, if she should die, leaving children, without having acquired the absolute interest, it should go to her children: but he gives it to her issue only in the event of her dying under the age of twenty-one; which brings it to the cases I have mentioned; a contingency, that has not taken place; upon which only the legacy is directed to vest. If I could have determined in favor of any of the parties before me, it must have been for the representative of Isabella Parsons: but I am under the necessity of declaring, that neither the Plaintiff George Parsons nor the Defendant Robert Parsons, as administrator of his wife, took any interest in the legacy of 1600*l.* Bank Annuities; the contingency, upon which the same was given, not having taken place (3).

1. COURTS of law will not answer a case sent to them respecting a trust. *Bayly v. Morris*, 4 Ves. 790.

2. In the construction of a will, implication must never prevail, when such im-

(1) See the note, *ante*, 546; and vol. iv. 59.

(a) The hardship of this case seems to be remedied by 1 Vict. c. 26, s. 33. See 2 Williams, Executors, (2d Am. ed.) 880. 1 ib. Preface xix. § 33.

(2) *Ante*, vol. iii. 236, 536.

(3) *Ante*, *Holmes v. Cradock*, vol. iii. 317; *post*, *Pearsall v. Simpson*, xv. 29.

plication is not a necessary one; *Upton v. Lord Ferrers*, 5 Ves. 805: see, *ante*, note 3 to *Holmes v. Cradock*, 3 Ves. 317, and the farther references there given. "Necessary inference," however, (as those words are used in legal phrase,) must not be understood as importing inevitable, natural necessity; but merely an implication which, upon a consideration of the whole context of a will, leaves no doubt in the mind of the judge who has to decide the question; see note 3 to *Brummell v. Prothero*, 3 V. 111.

3. That a legacy may be prevented from vesting by making it a condition precedent, that the legatee shall be living at the time fixed for its payment; see note 5 to *Crickett v. Dolby*, 3 V. 10.

SPRAGG v. BINKES.

[ROLLS.—1799, JULY 11. 1800, MARCH 3; AUGUST 13.]

BILL by the assignee of a person, who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an insolvent act, in respect of the surplus against the assignee, the trustee and mortgagees, dismissed with costs. (a)

The Court has perhaps gone too far in permitting assignments of rights in accounts to be taken. Such a right cannot be parcelled out; so that every person may file a bill, [p. 589.]

A bankrupt cannot file a bill of redemption in respect of his right to the surplus: (b) but where he has a clear interest, and the assignees refuse, the Lord Chancellor will upon petition and an offer of indemnity compel them to let him use their names, [p. 590.]

HENRY EVANS HOLDER by indentures of lease and release, dated the 30th and 31st of March, 1792, conveyed and assigned [*584] ed * to Thomas and John Daniel, their heirs, executors, administrators, and assigns, a freehold plantation and premises in the island of Barbadoes, with the buildings, and appurtenances, negroes, slaves, cattle, and stock, subject to an annuity of 150*l.* issuing out of part of the premises, to his wife for her life, if she should survive him; with a proviso for redemption on payment of 898*2l.* 15*s.* 3*d.* the debt then due to Thomas and John Daniel, and such other sums as they should advance.

By indentures of lease and release, dated the 25th and 26th of March, 1794, the same estates, and the slaves, cattle, and stock, were conveyed and assigned to Binkes and another trustee, their heirs, executors, administrators, and assigns; upon trust, subject to an annuity of 400*l.* a-year for Holder during his life, to pay his creditors.

In October 1795 Holder took the benefit of an Insolvent Act; and the estate in the island of Barbadoes with other property of his was conveyed by the Clerk of the Peace to Binkes, his heirs, executors, &c., in trust for his creditors.

By indentures of lease and release, dated the 11th and 12th of

(a) See *Ex parte Donovan*, 15 Ves. 8; 2 Madd Ch. Pr. (4th Am. ed.) 706; Story, Eq. Pl. § 153, *et seq.*

(b) See 1 Barbour Ch. Pr. 647-657; Lubé Eq. Pl. (1st Am. ed.) 58, 59; *De Carriere v. De Callonne*, *ante*, 4 V. 577, note (a), and cases there collected.

December, 1795, Holder conveyed and assigned the said plantation and premises, negroes, and stock, in Barbadoes to James Spragg, his heirs, executors, &c. subject to the trusts of the said deeds for the benefit of his creditors and the prior charges, to pay himself a debt of 750*l.* with interest, (for which Holder's promissory note was then given up,) and such farther sums as she should advance; and as to the surplus money arising from the said estate, in trust for Holder, his executors, &c. Upon a farther advance, amounting in the whole to 1766*l.* 19*s.* 3*d.*, Holder upon the 24th of March, 1798, released and assigned all his remaining interest in the estate to Spragg, upon Spragg's securing to him an annuity of 400*l.* a year for his life; and Spragg executed a bond in the penalty of 5000*l.* for securing the annuity. By a subsequent agreement upon the 21st of May, 1798, Holder gave up that annuity in consideration of 2900*l.*

The bill was filed by Spragg against the Daniels, Holder, and Binkes, the surviving trustee in the deed for the benefit of the creditors, and Troughton, another mortgagee; praying an account in respect of the surplus, after discharging the incumbrances and execution of the trusts.

* Thomas and John Daniel had been consignees of part [* 585] of the produce; and had kept down their interest, and retained, in respect of the principal due to them, to the extent of 612*l.* 19*s.* 4*d.*: and part of the produce had been paid over by them to Holder or on his account.

This cause was argued first upon the 11th of July 1799; and again, by the direction of the Master of the Rolls, on the 3d of March 1800.

Mr. *Richards* and Mr. *Johnson* for the Plaintiff. The deed of trust amounted in effect only to a second mortgage. The mortgagor had a right to an account in respect of the surplus; and he conveyed all his interest to the Plaintiff, in consideration of money paid and an annuity; the latter being afterwards given up by a new agreement in consideration of 2000*l.* It is objected against the Plaintiff's right to sue, that he purchased from a man insolvent in two or three capacities; and it is said, Holder had no interest, that he could assign. There is no doubt, a bankrupt has an interest in the estate, which passes to his assignees; and has a right to apply against the assignees in respect of the surplus either by bill or petition. Then is not that interest such as he can assign? What right have any of these creditors to object either against Holder or his assignee? Can it be said, a mortgagor cannot sell his equity of redemption? Many estates now depend upon such a title. The purchaser takes, subject to the mortgage. Holder had without doubt a real interest in the estate; which his heir at law would have taken by descent. The mortgagee generally takes care of himself; seldom lending more than the value of the estate; and the interest being seldom equal to the rents.

Mr. *Piggott*, Mr. *Romilly*, and Mr. *Jordan*, for the Defendants

Thomas and John Daniel; Mr. *Hall*, for the trustee Binkes; and Mr. *Bell*, for the Defendant Troughton. This is the first instance of such a bill. A bill by a vendee of a bankrupt after the bankruptcy and assignment has never yet appeared in a Court of Equity; and it is impossible; for the bankrupt laws, and by analogy to them an Insolvent Act, vest in the most ample words all the debtor's interest right and title, in the assignees in the one case, in the Clerk of the Peace in the other; expressly directing them, and them only, to sue for that estate; reserving, it is true, the surplus to [* 586] the debtor; which *would necessarily result to him. That surplus is personal estate, by the effect of the bankrupt laws, turning all the leasehold estate into personal property for the benefit of his creditors. It is a mere right to an account. The surplus of the real estate does not vest in the heir. The trust deed subjected these mortgagees to a suit: but the trustee did not call upon them. The trustee has all Holder's interest. His title to the estate is gone; and all, that is left in him, is a right to an account. It is said, here are all the parties; and therefore they cannot object. Will the Plaintiff redeem them? Will he say, he means to redeem them all? That is all he has to do. He cannot be let in, till he pays them all. What satisfaction would it be to foreclose this Plaintiff? All the purchasers under the Act have a complete title. By that Holder is in a perfectly different situation. Before that he had an interest in him: but under the Act a most complete title can be made, analogous to the course of the bankrupt laws, subject only to the existing incumbrances. If any surplus remains, it is under the Act to be accounted for to Holder. That right he cannot urge from curiosity, and at the expense of the creditors. He cannot have a right to take all accounts for the sake of a surplus; which cannot be supposed. The presumption is, that there is not enough for his creditors. It is not pretended, that the Plaintiff has money to pay the debts; and, till they are paid, he cannot have a redemption. Holder has nothing to do with it. He has released; and put all equity of redemption out of him. All the other parties remain exactly, where they were. Nothing could be done as to them. The parties standing 2d and 3d do not desire any thing, but that it shall remain as it is; thinking the mortgagee is doing best for all by paying himself. The Defendant Troughton, a creditor by assignment of a debt prior to the trust deed of 1794, and also by assignment of a mortgage subsequent to that date, filed a bill to compel a sale by Binkes, the trustee; and that suit stands still, in order to prevent expense.

1799. *July 11th*. MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is a question of very great importance: how far the Court has gone in permitting bills of this nature. A learned Judge, Lord Chief Justice Eyre, whose loss the country has great reason to lament, sitting with me at the Cockpit a few days ago, went very much into the question of the propriety of entertaining

bills of this sort; and was of opinion, that Courts of Equity had gone too far in supporting them. We cannot be so rigid as Courts of Law; where but one person having the *legal [* 587] interest can bring the suit: in equity it is permitted by an assignee, and, I am afraid, in some instances, of a partial interest. The consequence is, there may be a great number of Plaintiffs. I must see, whether it is absolutely necessary, that these other parties must join with the Plaintiff; that the mortgagees after contending with this Plaintiff, may not be harassed by the trustee; and find, they have gained no ground. Therefore the trustee must be bound. A bankrupt cannot bring a bill certainly (1). He does not want a bill against his assignees: but, where he has a clear interest, and the assignees refuse, the Lord Chancellor upon petition would compel them upon an offer of indemnity to let him use their names. My doubt is, whether these other parties ought not to be co-plaintiffs; whether the Court, though they do permit equitable interests to be assigned, will not require, that they shall come together: otherwise a man may make twenty assignments, and each assignee may file a bill. I am very much inclined to check the practice of buying titles in this Court; which has of late increased in an alarming degree; and I do not know, where it will end. If every man claiming to be assignee of a mortgage may bring a bill without the mortgagor, how will any one take a mortgage?

Mr. *Richards*, in reply. The case of *Detillin v. Gale*, now depending in this Court, is exactly upon this principle. The Plaintiff, who was completely insolvent, filed the bill against incumbrancers and against a trustee for general creditors; and an account was directed against the Defendants; one of whom has been in prison above a year for a contempt. The only distinction between that case and this is, that bill was filed by the insolvent debtor himself; and this is by the assignee. That makes no difference. If he had died the interest would have gone to his representatives. A bankrupt has an interest to release; and without releasing he cannot be a witness: if so, he has an interest to convey or assign. *Non constat* in any case, that there will be a redemption. If the mortgagor is a pauper, he has a right to a decree for redemption, if he offers to redeem; though the property may not be worth it. What hardship can there be upon the mortgagees, possessing a very ample security. If costs are incurred, the costs are added to the principal and interest; and are a charge upon the property. The circumstance, that *Troughton*, another mortgagee, has also filed a bill, is no answer. The same objection might be made in every case, where there are several mortgages. It must come to the question, whether Holder had any interest, or not, in the property. *The [* 588] Plaintiff has the same right, that he had, as *cestui que trust* to redeem the mortgages, and to call upon the trustee *Binkes* to

(1) *Post*, *Benfield v. Solomons*, vol. ix. 77; *Saxton v. Davis*, xviii. 72; 1 *Rose*, 79; *Hammond v. Attwood*, 3 *Madd*. 158; *Lloyd v. Lander*, 5 *Madd*. 282.

execute the trust and deliver up the surplus. He must have an interest in it, either as real or personal estate. The doubt, whether possibilities could be assigned, is now at rest even at law. They were always assignable in Equity (1). A vendee cannot compel the vendor to be Plaintiff. This objection, if it prevails, will make it impossible to sell an estate, subject to a mortgage, without an express stipulation, that the mortgagor shall suffer his name to be used. Having given up all his interest he will not consent to be Plaintiff. Upon the records of the Court there must be many instances of bills by purchasers of equities of redemption; and there is no instance of the mortgagor being a co-plaintiff. It will disturb many titles to alter this. Many titles have been taken without any stipulation by the mortgagee, and without any stipulation by the mortgagor that he shall suffer his name to be used; and then it is impossible to compel him. The danger apprehended by the Court does not arise in this cause; for every person, who can by possibility have an interest in this equity of redemption, is before the Court. It cannot be doubted, that a person who has taken the benefit of an insolvent debtor's act, may file a bill against his trustee, for an account of his conduct; and calling upon him to execute the trust, to sell the estate; and calling upon the mortgagees for an account and a redemption. The assignment under the act is no more than any other assignment equally extensive. The circumstance, that there were two conveyances in trust to sell, can make no difference; nor, that the second is by Act of Parliament. In every conveyance for payment of debts, all right, title and interest, is conveyed. Without doubt each mortgagee or creditor by judgment may file a bill for redemption. Any person having an interest in the equity of redemption has a right to clear the incumbrances, and get the estate; and the first mortgagee has no right to refuse to be redeemed by any person having an interest in the equity of redemption. If they all should file their bills at the same time, the Court would direct a reference to inquire, who was entitled to redeem. The subject of inquiry upon a conveyance for payment of debts is, whether the estate will pay the whole. It is admitted, Holder is to be considered the Plaintiff; and then he has a right to call for an execution of [* 589] the trust; and he cannot * obtain it in any way but by a bill in a Court of Equity; for there is no short remedy under the act. The persons making this objection are mortgagees; who of course are desirous of keeping the estate. The utmost length the Court would go in their favor would be, to prevent them from being unnecessarily harassed, by imposing a condition, that, if the money shall not be paid at the time limited, the equity of redemption shall be foreclosed.

Aug. 13th. The MASTER OF THE ROLLS [SIR RICHARD PEPPER

(1) A possibility coupled with an interest is also devisable. *Perry v. Phelps*, ante, vol. i. 251; see 254.

ARDEN]. This is one of the most extraordinary cases ever brought before the Court. I am under great difficulty ; as I cannot find any precise ground, upon which the Court proceeds as to entertaining bills filed by purchasers of what are called equities. The Court has gone a great way, perhaps too far, in permitting persons to assign over for what is called valuable consideration, (I can hardly think it so in this case), rights in accounts to be taken ; and it appears to me that a notion has gone abroad, that a man may parcel out such a right to different persons, and every one of those persons may file a bill *pro interesse suo*. That would be one of the most oppressive rules, that can be imagined. Though I have made decrees in favor of assignees of equities in something like such a situation, I am by no means persuaded, that it is competent to a man to do so. On the contrary, I think this Court ought to interpose. Consider, how far this Plaintiff is in such a situation. The bill states this curious case. Holder, seised of this estate, subject to mortgages, and being otherwise much indebted, in 1794 conveyed, subject to an annuity of 400*l.* a year for himself for life, to a trustee for the payment of his creditors. In October 1795 this unfortunate man was so much distressed as to be actually under the necessity of taking the benefit of an Insolvent Act ; by which his annuity of 400*l.* a year was given up to his creditors ; and he was entitled to nothing more than what should remain after paying his creditors. He was exactly in the situation of a bankrupt. The conveyance under the Insolvent Act was made in October 1795 ; and in December the first transaction, upon which this bill is founded, took place ; and this is the statement of the Plaintiff's own bill ; that Holder being previously indebted to the Plaintiff to the amount of 750*l.* offered to secure the same upon the said plantation and his annuity of 400*l.* a year ; and conveyed accordingly. He had no such annuity. The bill then states a subsequent advance by the Plaintiff to the amount of 1766*l.* 19*s.* 3*d.* ; upon which Holder released and assigned all his remaining interest to the Plaintiff upon his securing an annuity of 400*l.* a year for the life of Holder ; and the Plaintiff executed a bond in the *penalty of 5000*l.* for securing that annuity. This [* 590] was an absolute conveyance, subject to the trusts of the said deed and the prior charges. This is not all : but upon the 21st of May 1798 Holder proposed to give up the annuity ; and in consequence of 800*l.* actually paid to him, for so it is charged, and promissory notes for 2100*l.* that proposal was carried into execution ; and the Plaintiff being so entitled modestly comes into this Court ; calling for a redemption and an account from the trustees. The worst part of the story is the answer put in by Holder ; admitting all these facts to be true ; that he received all this money, and joined in these deeds ; and he is at this time receiving an allowance of three guineas a week from the mortgagees. I cannot permit the Plaintiff to state this story. As to the mortgagees I never had any doubt, that he could not redeem. In the case of bankruptcy only the assignees could file the bill. The bankrupt might apply to the

Lord Chancellor in a short way; but could not redeem. What made me take so much time upon this was, that I thought, the insolvent debtor might file a bill in this Court, if the assignees did not in a certain time. The act of 21 Geo. III. (1), requires the assignees to do what can hardly be done, to sell in three months. They could hardly do that; and in this instance it was an equity of redemption; and an account was to be taken. It is said, and I rather think so, that it is illegal to purchase from a person in this situation. I am under vast difficulties as to these assignments of equities. It is very difficult to draw the line. To say, there can be no assignment of such a subject, would be against all practice: but then it must be a fair case.

The Court proposed that the bill should be dismissed against the mortgagees; and that the account against the trustee should be taken under this bill; but upon a statement, that Holder was in a deranged state of mind, that his answer was put in by Spragg, and the transaction passed, when both of them were in prison, the bill was dismissed with costs.

1. THAT collusion between the responsible party and the party who ought to sue for the benefit of another, may give such third person a fair claim to be permitted himself to institute and conduct all necessary proceedings; see, *ante*, note 2 to *Uttersen v. Mair*, 2 V. 95; but that proceedings by bill will be discountenanced, whenever the requisite relief may be obtained in a shorter and cheaper mode; see note 4 to the same last-cited case.

2. A mere general charge of collusion on the part of his assignees will not sustain a bill for relief brought by a bankrupt; *Benfield v. Solomons*, 9 Ves. 77; *Saxton v. Davis*, 18 Ves. 72, or by a debtor who has taken the benefit of the Insolvent Act, and thereby vested his right to sue in the assignees. *Bowser v. Hughes*, 1 Anstr. 101. But a bankrupt may file a bill for discovery, in aid of a defence of law, and that any accounts, without which the discovery would be unavailing or incomplete, may be taken. *Loundes v. Taylor*, 1 Mad. 425. But this must of course be understood only of cases in which the action is not brought under the direction of the Great Seal, which has prescribed the course of proceeding. There may be cases in bankruptcy in which the Court would order a bill of discovery to be filed; but where an order has been made, in bankruptcy, for leave to bring an action, with a direction that the bankruptcy shall not be set up to defeat such action, which is moreover not left liable to the incidents of a common action, but accompanied with a special direction for the production of all papers, &c. both in the Master's office and at the trial; should the bankrupt file a bill of discovery, it would be indispensably necessary to stop the proceedings under such a bill, which might otherwise involve the absurdity of an application to the holder of the Great Seal, sitting in Chancery, to grant an injunction against a proceeding at law, which he had himself ordered when sitting in bankruptcy. If, indeed, the production of all papers, &c. as ordered, were defeated by a trick at the first trial, the Lord Chancellor would order the question to be tried again, though it was put in the form of an action. But if a bill of discovery could be sustained in such a case, the jurisdiction in bankruptcy might be suspended, during all the proceedings in a suit of Chancery, and upon appeal to the House of Lords. *Cooke v. Marsh*, 18 Ves. 210; *Ex parte Coles*, Buck, 209.

3. A plea of the plaintiff's bankruptcy cannot be admitted in bar of a suit, unless it aver, distinctly, all the successive facts establishing the commission. *Carlton v. Leighton*, 3 Meriv. 671. A plea of this nature must, also, be put in on oath. *Joseph v. Tuckey*, 2 Cox, 44.

4. A bankrupt cannot, in the first instance, file a bill against a debtor to his estate, on the ground of the invalidity of the commission against him, or (as we have seen) upon a bare allegation of collusion between his assignees and his debtor: the proper course for him to pursue would be, in the one case, to bring an action to try the validity of the commission; or to apply, in the other case, by petition, for the removal of the assignees; or that he may be permitted to use their names in an action indemnifying them. *Hammond v. Attwood*, 3 Mad. 158; *Benfield v. Solomons*, 9 Ves. 84.

5. It is a common practice in Ireland, to decree a sale of a mortgaged estate, instead of a foreclosure: *Giffard v. Hort*, 1 Sch. & Lef. 387; *Lighbourne v. Swift*, 2 Ball & Bea. 211; *M'Donough v. Shewbridge*, 2 Ball & Bea. 563: the same course is followed in the West Indies: *Beckford v. Kemble*, 1 Sim. & Stu. 15: and in those countries, if the sale produce more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his personal remedy for the difference. But this rule, though (as said by Lord Erskine) more analogous to the relative situation of borrower and lender, is not adopted, with respect to bills of foreclosure, in English Courts of Equity; which, as in the principal case, never decree a sale unless by consent of the mortgagee; *Perry v. Barker*, 13 Ves. 205; *Goodier v. Ashton*, 18 Ves. 83; *Postlethwaite v. Blythe*, 2 Swanst. 257; or at any rate, only in those instances in which the bill is taken *pro confesso*. *Dashwood v. Bilhazey*, Mosely, 196. Of course, a mortgagee cannot subsequently object to a sale when he has framed his bill for that very relief: *Daniel v. Skipwith*, 2 Brown, 155; *Kirkham v. Smith*, 1 Ves. Sen. 261; *How v. Figures*, 1 Cha. Rep. 33: but where no such consent on his part is necessarily to be implied, a mortgagee can never be compelled to submit to a sale or to relinquish the estate until he has the mortgage money actually in his own hands. *Postlethwaite v. Blythe*, 2 Swanst. 257. When a mortgaged estate devolves upon an infant, if the mortgagor will consent to a sale, a reference may be had to the Master, to inquire and report whether that course will be for the benefit of the infant; *Mondey v. Mondey*, 2 V. & B. 224; instead of making the usual decree of foreclosure against him, with a day to show cause when he attains his age of twenty-one years. *Goodier v. Ashton*, 18 Ves. 83; *Spencer v. Boyes*, 4 Ves. 371.

6. The equity which a plaintiff offers on his own part, by his bill, ought to quadrate with the decree which he asks; and the right of the mortgagee to his money cannot be changed by the act of the mortgagor in creating a trust: the trustees can have no farther right, as against the mortgagor, than to redeem; and if they bring a bill not properly framed for that purpose, the defect furnishes a sufficient cause of demurrer. *M'Donough v. Shewbridge*, 2 Ball & Bea. 562, 564.

SITTINGS BEFORE MICHAELMAS TERM.

[41 GEO. III. 1800.]

GARDINER v. EDWARDS.

[1800, Nov. 3.]

THE writ of *Ne exeat regno* refused: the circumstances not affording a sufficient ground. (a)

MR. OWEN moved, that a writ of *Ne exeat regno* might issue against the Defendant on the following circumstances, stated by the affidavit of the Plaintiff.

— Richings by deed of gift, dated the 22d of March 1799, gave all his property to the Plaintiff Sarah Gardiner and the Defendant William Edwards; in trust for himself for life; and after his decease to pay several sums to different relations, and also 400*l.* to the Plaintiff and 800*l.* to the Defendant. By his will executed in May 1799 he appointed the Plaintiff and Defendant his executors; and died soon afterwards. The Defendant, who was a mariner, possessed himself of property belonging to the testator, to the amount of 1000*l.*, as the deponent believes; and after the testator's death the Defendant possessed himself of other property; and in the whole he has possessed about 2000*l.*

The affidavit then suggested, that the Defendant intended to go abroad; that he had declared his intention of going to America without executing the trusts of the deed; having been accused of the murder of the testator: but the grand Jury had thrown out the bill. The Plaintiff also suggested, that she was in danger from the Defendant.

[* 592] * Mr. Owen in support of the motion observed, that the Lord Chancellor had said (1), this is an application to the discretion of the Court; not in the nature of an application to hold to bail; and whether the property belongs to the next of kin, or to the persons claiming under the trust deed, it would be right to secure it, to prevent injustice.

LORD CHANCELLOR [LOUGHBOROUGH]. It is too general a ground to take for supporting this writ or any other proceeding in this Court, that I will act generally to prevent injustice (2). The affidavit does not even state, that the Plaintiff is in the possession of the deed; and she swears to the very words of it. The next of kin do not ap-

(a) See 1 Barbour, Ch. Pr. 647-657; Lubé, Eq. Pl. (1st Am. ed.) 58, 59; *De Carrière v. De Callonne*, ante, 4 V. 577, note (a), and cases there collected.

(1) *Ante*, vol. iv. 590.

(2) See Beames's *Ne exeat Regno*, 83.

ply. I understand their title ; for if there is no will, that can be supported in the Ecclesiastical Court, they have a clear right ; and in such a case perhaps I might interfere for them. But the whole of this case, when I read it, is completely suspicion, and altogether an extravagant story. The Plaintiff and Defendant obtain this trust deed from this man. He gives them these sums ; and gives some small sums to other relations. Then he makes a will ; and makes them executors. The affidavit then stated pretty broadly, that the Defendant murdered him. The Grand Jury threw out the bill. The Plaintiff then represents, that she is in danger from the Defendant ; and instead of applying for security of the peace, a *Supplicavit* is part of the prayer. I do not see any ground. She has no present right. There is no written document ; nothing but this strange story.

No order was made (1).

1. THAT a plaintiff must show an *equitable* title to relief, before he is entitled to claim the assistance of the Court of Chancery ; see, *ante*, note 2 to *Moely v. Virgin*, 3 V. 184.

2. As to the general doctrine with respect to the grounds upon which the writ of *ne exeat* issues ; see the notes to *De Carriere v. De Calonne*, 4 V. 577.

BARSTOW v. KILVINGTON.

[* 593]

[1800, JULY 21 ; AUGUST 11.]

SETTLEMENT reformed in favor of the younger children against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention. (a)

Settlement after marriage reformed in favor of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement : but this equity did not prevail against creditors, [p. 596, note.]

Settlement to such uses as the husband and wife shall jointly appoint, and in default of such appointment, to them for life ; and after the decease of the survivor to the use of all or any of the child or children of them in such shares and proportions and for such estate and estates, term or terms, and payable at such time or times and in such manner and form, as the husband should by deed or will appoint ; and in default thereof to him and his heirs. The event, upon which the last limitation depends, is default of appointment, not, of children, [p. 596, note.]

By indentures of lease and release previous to the marriage of John Kilvington and Elizabeth Orfeur, dated the 26th and 27th of April, 1742, freehold estates, of which Elizabeth Orfeur was seised

(1) *Roddam v. Hetherington*, *Russell v. Asby*, *ante*, 91, 96, [and the notes in these pages, in this edition.] *De Carriere v. De Calonne*, vol. iv. 577, [note (a)] and the note, 592.

(a) 1 Story Eq. Jur. § 159, § 160 ; *U. States v. Munroe*, 5 Mason, 577 ; *Hunt v. Rousmaniere*, 1 Peters, 13.

The power of a Court of equity of general jurisdiction to reform or rectify contracts is not within the jurisdiction of the Supreme Judicial Court of Massachusetts.

in fee, were conveyed in consideration of the marriage and other considerations therein mentioned to trustees, their heirs and assigns, to the use of Elizabeth Orfeur till the marriage; and after the marriage to the use of John Kilvington and Elizabeth, his wife, for and during their natural lives and the life of the longer liver of them, and from and after the decease of John Kilvington and Elizabeth his intended wife, and of the survivor, to the use and behoof of all and singular the children of the said Elizabeth by the said John Kilvington lawfully begotten, sons and daughters, share and share alike, as tenants in common and not as joint-tenants; and, in default of such issue, to the said Elizabeth, her heirs and assigns for ever.

The issue of this marriage was two sons, John Kilvington, and Henry Medley Kilvington, and three daughters; of whom two died in the life of their parents under the age of twenty-one, and without issue, and before the birth of the other children. In 1768, after the death of John Kilvington the father, Jeremiah Barstow married the surviving daughter Dorothy. Elizabeth Kilvington died in 1778; leaving John Kilvington her eldest son and heir at law. Upon her death her two sons and Barstow in right of his wife entered; and they received the rents in thirds till the death of John Kilvington the younger in 1788: who by his will made a general disposition of all his real and leasehold estates to his wife and two other persons in trust. The trustees brought an ejectment for three fifths, in which a special verdict was found for the Plaintiffs in the action; who upon the argument of that verdict in the Court of King's Bench obtained judgment.

The bill was filed by Mr. and Mrs. Barstow and on behalf of the infant Henry Medley Kilvington, against the infant son and heir of John Kilvington the younger, and against his widow and the other devisees in trust with her under his will; charging, that

[* 594] * the settlement was intended as a provision for the issue of the marriage; and the intention of all the parties was, that the estate should be settled so as to vest estates of inheritance in the children; and so that Elizabeth Kilvington should take the reversion only in default of all issue. Upon the marriage of the Plaintiff Barstow it was represented to him by Elizabeth Kilvington, that the estate was so settled, that it belonged to Dorothy Kilvington and her two brothers, as tenants in common in tail or in fee, subject to the life-estate of Elizabeth Kilvington; and so that upon her death Dorothy would become entitled in tail or in fee to one third. Therefore Mrs. Kilvington demanded, that Barstow should before the marriage settle 100*l.* a year out of his own property; and she wrote the following letter to him, dated the 16th of December, 1768:

setts. *Leach v. Leach*, 18 Pick. 68; *Dwight v. Pomeroy*, 17 Mass. 303; *Babcock v. Smith*, 22 Pick. 61, 70. See farther on this subject, *Pember v. Mathers*, 1 Bro. C. C. (Am. ed. 1844) 54, notes; *Tilton v. Tilton*, 9 N. Hamp. 391; *O'Callaghan v. Cooper*, *ante*, 117; and *Randall v. Willis*, *ante*, 262, and the notes to those cases

"My brother desired me to acquaint you in case of your agreeing to my proposal to settle a hundred a year out of your estate upon my daughter that you shall upon my death be entitled to an equal share with my two sons in my estate at North Duffield besides the 1500*l.* left by her father's will. This Mr. Orfeur desires me to inform you of; as we suppose, you do not know it. Indeed the small estate was my own before marriage with Mr. Kilvington. I agreed with him, it should be settled equally upon our children for ever if we had any."

The bill farther charged, that upon the faith of this letter Barstow settled 100*l.* a year. The prayer was, that the settlement may be rectified, so as to convey two thirds of the estates to the Plaintiffs respectively in tail or in fee; and, if the Court shall be of opinion, that the Plaintiffs are not entitled to that, that the Plaintiffs Barstow and his wife may be declared entitled under the said letter, contract, or agreement, with Elizabeth Kilvington, to one third; and that a conveyance may be directed accordingly.

The Plaintiffs, in order to prove, that John Kilvington the younger constantly acknowledged their title to two thirds, produced in evidence accounts, showing, that after the death of Mrs. Kilvington the rents were divided in thirds till the death of John Kilvington, and a letter from him to Mrs. Barstow, dated March 6th, 1788, stating that their brother Medley was *desirous [* 595] either to have the estate sold by them all or divided; and recommending her to join in a sale; as it was a very small matter to divide in three; and an undivided share would sell to great disadvantage; and observing, that her share of the purchase-money might be so settled as to be as much her's as the estate was.

The Plaintiffs also went into evidence of declarations by Mrs. Kilvington in her life.

The answers did not admit the intention suggested by the bill as to the settlement. They submitted, that the estates are to be divided into five parts; that two fifths vested into the two deceased daughters for their lives only; that John Kilvington, as heir to his mother, became entitled to two fifths, and also under the settlement in his own right to one fifth; and the Plaintiffs to the other two fifths respectively for their lives. The Defendants insisted that no representation of the mother could alter the legal effect of the settlement. They suggested, that the Plaintiff Barstow received a fortune adequate to the settlement; and submitted, whether he became a purchaser of one third of the estate, and whether the Defendants are bound to fulfil the contract of Elizabeth Kilvington to the extent of what John Kilvington took by descent from her.

The *Attorney General*, [Sir John Mitford], and Mr. King, for the Plaintiffs. *Randal v. Randal* (1) is a case of the same kind, as to mistake in the formation of the settlement. In this case Mrs. Kilvington has by writing declared, what the agreement was; which

(1) 2 P. Wms. 464; *Doran v. Ross*, ante, vol. i. 57.

shows, the settlement was a mistake : the intention being, that the estate should be given to all the children, and to her only in case there should be no children. In *Taylor v. Radd*, which was much agitated before Lord Thurlow, he laid down the rule with great latitude ; that if a mistake appears, it is as much to be rectified as a fraud ; though his Lordship thought, there was no mistake in that case. There have been many cases of bonds, where the sum has been mistaken. All those cases are referred to in *Burn v. Burn* (1).

[* 596] So, in the case of a mistake in a policy of insurance. In *Jenkins v. Quinchant* (2) it was held, that, if the fact of

(1) *Ante*, vol. iii. 573.

(2) The *Attorney General* [Sir John Milford,] cited this case from the following manuscript note, with which the Reporter has been favored :

Husband and wife after marriage convey the wife's estate to such uses as they shall jointly appoint, and in default of such appointment, to them for life, and after the decease of the survivor to the use and behoof of all or any of the child or children of them in such shares and proportions and for such estate and estates term or terms, and payable at such time or times, and in such manner and form as the husband should by any deed or deeds or other instrument in writing or by his last will and testament direct, declare, limit and appoint: and *in default thereof* to the husband, and his heirs and assigns for ever.

The wife died; leaving Plaintiff the son; having first mortgaged the estate with her husband.

The husband died; making no appointment to the son, but devising it by will to Mrs. Quinchant his second wife.

Bill by the son; who claims the estate.

Question, Whether the words "and in default thereof" should be in default of appointment by the husband, or in default of the children of the marriage.

The creditors claimed it as assets.

A letter from the husband, containing the instructions for the drawing the settlement; directing, that, if he died without issue by her, he was to have the power of disposing of it.

LORD CHANCELLOR. By the opinion I am of, it will not be necessary to determine some points upon this settlement, that are of real difficulty.

The claim against the present Plaintiff is hard; to take away the estate from him.

1st, Upon the construction of the deed.

2d, If that against the Plaintiff, whether he may not pray relief upon the head of *mistake*, to have the limitations rectified by the letter of instructions.

3d, If he may, how far it is to extend, whether over the whole estate, or some part, upon a new appointment supposed to have been made, when the estate was afterwards mortgaged.

1st, It is a deed of voluntary settlement to trustees after marriage.

The only question is upon the words "in default thereof" of issue or appointment — if the latter, the issue are to take nothing, if he makes no appointment.

The Plaintiff says, the latter is an unreasonable and unnatural construction of the mother's intention. Upon the deed, which is *inter vivos*, and of legal limitation, the words of it must prevail. I am much disinclined to do it: but I must be of opinion, that it means in default of appointment: if any estate had vested without appointment, I should have been of a different opinion; but there are none: it is only to the child he appoints.

It is expressed, as it was upon Lord Sunderland's will, * to *such* children as he appoints and for such estates. If they had been out, and there had been only the word "*proportions*," it might have been said, that it related only to the case of more children than one.

I do not go on strict rule, that words must relate to the next antecedent. That has many exceptions and limitations; never applied to the next, if improper. †

* *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61.

† See *Thellusson v. Woodford*, *ante*, vol. iv. 227.

mistake could by the instructions or by other means be established, there could be no doubt as to the relief.

Another circumstance in this case, which gives a clear right as to Mrs. Barstow, putting mistake out of the question, is, that Mrs. Kilvington held out to Mr. Barstow, that upon her

I go on this:—they must refer to some accident to happen, or event to be done, before it can vest: the appointment of the father. They do not consider, that by this limitation any estate can vest in both or either of the children.

But the Plaintiff says, the limitation to the husband in default thereof will be a *springing use or contingent remainder, and then in meantime [* 597] the estate goes by descent to heir; who is first son. Cannot be a springing use, because it is in default of issue generally; too remote either on will or deed.

Cannot recover. — I would not say if the intention would warrant it, but it may be good on default of issue of a stranger: one, who takes nothing by the deed: but the contingency has not happened, they say; and so it descends—that is impossible to be agreeable to the intention of the parties: because, if there had been daughters and no sons, and husband died before the wife, and she had a son by a second husband, that son would have carried off the estate from the issue of this marriage. It was not that view.

I cannot make this construction upon these words: but "*thereof*" must refer to some act described before the appointment.

Yet I am clearly of opinion, that the husband and wife were mistaken, and that they apprehended, the word "*thereof*" meant in default of children.

They acted accordingly; yet if it had stood singly upon the deed, the deed must have had its legal operation. That brings it to the second question.

2d, The letter is admitted; and that in consequence of the letter the settlement was drawn and in pursuance of it. The letter is without date, and not proved when wrote, or received, and therefore it could not affect the mortgages, if the party intended to do it; but between Plaintiff and Quinchant and his wife, who was second wife to Jenkins, and his devisee, a material question arises; for Plaintiff says, the instructions were mistaken. It is said, I ought not to take this as the only instructions: but I think, it does not appear, that there were any other instructions, and it is admitted, that the settlement was made in consequence of this letter.

What limitation would have pursued these instructions? Not to any particular child, but "to such as we shall think proper," these are the words of the letter in relation to the children. Yet the lawyer has made some mistakes; for he has made it subject to the appointment of the husband only; it should have been husband and wife. So the other provision: "He to have the power over it, if he had no issue by her." What limitations would have been proper?

Why to vest it in the children in some way or other; and if there should be no issue, to the husband—and "issue" takes in "children" and all sorts of limitations among them.

But objected, that where a man comes to rectify a settlement from mistakes, he should not only show, there was some mistake, but what the mistake was; and what limitations should have been made instead of those made: how else can the Court tell how to rectify it? It is right, and if it is not done, the legal operation must prevail. I am of opinion, that here is no doubt, what should have been done. This is a question between the two sons, what was the intention. They say, all equally to take it.

I think I cannot make such construction. If it had been a marriage settlement, I could not, but it would have been a limitation to first and every other son.

I agree, that this is not to be taken so strongly; because it is voluntary: but the intention was clearly to leave it to the judgment of the husband and wife according to the state of the family. They had then two children. The youngest is provided for. They might have more. They have not.

I am therefore of opinion, that from the implication of the word "issue" the usual limitation should take place, and that the settlement should have been to

death her daughter would be entitled to one third ; upon which he made a settlement according to her desire. The mere circumstance of standing by in such a case has been considered as binding the party : but where this sort of encouragement has been held out, there is no doubt, the person holding it out and all claiming under that person, are bound. In *Teasdale v. Teasdale* (1) a father having stood by, while a settlement was made by his son, and being privy to the fact of the settlement, though not conusant of his title, was bound. It is clear, that if the fact had been understood, Mrs. Kilvington would have been called on to make a settlement of one third. This is stronger therefore than *Teasdale v. Teasdale* : Mrs. Kilvington having been active in the treaty ; and having held out to the husband, that her daughter was entitled to this third of the estate. She understood that to be the effect of the settlement : or she knew, it was the agreement on her marriage, but defectively executed. The estate therefore must continue to be enjoyed, as it has been, in thirds ; and then all the Plaintiffs are entitled : but though the construction of the settlement should be clear at law, the Plaintiff Barstow is entitled in equity to have it rectified. There could have been no doubt, if a suit had been instituted during the life of Mrs. Kilvington.

[* 599] * Mr. Lloyd and Mr. Alexander, for the Defendants.

This is a case of the first impression. A Court of Law has already construed this settlement ; and it could not be the subject of doubt at law. With respect to any equity, there are no articles, no agreement, nothing to show an intention different from that expressed in the deed. There is no instance of correcting an actual settlement, conveying legal estates, unless there is something to cor-

such issue as they appoint ; if no appointment, to first and every other son ; then to the daughters : then to husband in fee.

[* 598] * But the Defendant still says, that the husband and wife have confirmed the settlement, as made ; and therefore no occasion to recur to any other instructions.

But the first confirmation they insist upon is a deed, by which they plainly admit, that they intended only to take in some other estate, that they thought would not be included in the first ; and they transcribe the settlement.

Then the recitals of this settlement in the subsequent mortgages : but they only recited it, as it stood ; and I lay the less weight ; because I am persuaded, that they thought the words "*default thereof*" meant of children.

Then against what parties will this rectification operate ? It cannot affect the mortgages or bonds ; and as to Mr. Lee, though, if he had notice, he might be affected, yet there is no proof of these instructions against him ; and therefore it cannot affect his debt.

3d, How far is this relief to extend, to all the estates or only part ? For it is said, that part of the estate was mortgaged by husband and wife ; and the equity of redemption being reserved, amounts to a new limitation and appointment ; and so this not subject to the relief—but, I think, they meant not to make any appointment but only to mortgage the estate.*

(1) Select cases in Chancery, 59. The Attorney General mentioned this as an anonymous book, and therefore perhaps not to be considered of so much authority.

* See some farther particulars of this case in the judgment, *post*, stated by the Lord Chancellor from Lord Hardwicke's Note Book.

rect it by, and to show the mistake. That rule is laid down by Lord Talbot in *Legg v. Goldwire* (1). Mrs. Kilvington's letter cannot under the circumstances be received in evidence. It is very dangerous to permit a letter written in this way, to be evidence of what it was intended this settlement should be; which was executed so many years before: the letter being written after the death of the husband and all other contracting parties. The letter also is very loose in its expression. If the settlement is to be corrected, what estate ought to be limited by this Court? The bill suggests an estate either in tail or in fee: but it is evident, the reversion in fee was to go to the mother; which could not be, upon the construction, that the preceding limitation was a fee; and supposing it an estate tail, by the death of two of the daughters without issue, unless cross remainders could be raised, the mother's reversion would have come into possession. If the terms of that letter are pursued, the limitations would have the same effect as those of the settlement. The cases cited bear no analogy to this. This Court has always been in the habit of correcting instruments, where manifest mistake appears upon the face of them, or can be shown by evidence. But there is nothing to rectify by in this case. The mistake, if any between these parties, was as to the construction, not in the preparation of the instrument. The jurisdiction in amending such an instrument by parol evidence of conversations and loose letters by persons unacquainted with business, is of a very delicate nature. In *Randal v. Randal* the husband had by a solemn instrument declared his intention in the execution of those instruments; and the reason, why it was kept secret and done in that form, also appeared. *Teasdale v. Teasdale* is a case of the same nature. The evidence arose at the time: a most solemn instrument was executed, explaining with great exactness what estate the son was intended to have: the father a party, or at least, *privy. Another class of [*600] cases is that of fines and recoveries: which are considered as common assurances; and therefore the Court of Common Pleas frequently amend them: and there cannot be any difference between that jurisdiction and this: but, there never has been an instance of that, unless some instrument, showing distinctly, what was meant by the parties, existed at the very time the fine or recovery passed, to amend by. *Powel v. Peach* (2) is a very strong instance: the attorney, who solicited that fine, giving very distinct evidence as to the mistake.

Upon the second point, relating to the Plaintiff Barstow only, this letter is too uncertain to proceed upon at this distance of time, after the deaths of parties. There is no recital in Barstow's settlement upon this subject. It appears clearly, that Mrs. Barstow had property sufficient to make her a purchaser of that provision of 100*l.* a year. The letter imports, not that Mrs. Barstow would be entitled

(1) For. 20. See all the cases upon that subject considered by Mr. Fearn, Cont. Rem. 138, &c. 4th edit.

(2) 2 Black. 1202.

in her own right, but that she, Mrs. Kilvington, would do some act to give her an equal share with her brothers after the mother's death. Taking the letter to amount to an agreement, as that and the settlement were both previous to the marriage, upon Lord Talbot's rule it must be presumed, they changed their intention, and came to a new agreement; which is evident from the want of any recital, and the circumstance, that Mrs. Kilvington was not a party. Mrs. Kilvington could have stated, how it was. Barstow, who was an attorney, if he relied upon this, ought to have taken care to have it inserted by way of recital. There is no contract or consideration to bind Mr. Kilvington. Though he executed the settlement, he was under age at his sister's marriage. If he was mistaken either in fact or law, it was an innocent mistake. Nothing is prayed upon his acts, letters and accounts. His letters are read only to show, what his understanding of the settlement was.

The *Attorney General*, [Sir John Mitford], in reply. If a bill had been filed against Mrs. Kilvington after the death of her husband, stating, that the contract was, that the estate should be settled, not so as to give her the absolute interest, subject only to the life-interests in her children, but that the children should take the absolute interest, and she had admitted an agreement to that effect, the Court would have rectified the settlement. She has by writing declared, that was the agreement. Undoubtedly the words [* 601] "for ever" are ambiguous. *The construction ought to be most beneficial to her, by construing it an estate tail, not a fee; and cross-remainders must be implied. The true ground of all the cases is, that if the fact of mistake is distinctly proved by unquestionable evidence, the Court will rectify the settlement according to the intention. The understanding of all the family affords a strong presumption of the intention. In *D'Olliffe v. The South Sea Company* (1) an issue was directed to try, whether the period was to be six months or two months, upon a mere verbal communication between the parties; and the jury found the mistake, that upon filling up the instrument six months were inserted instead of two months; and upon that verdict relief was given. D'Olliffe had given security not to carry goods under certain circumstances; and if information should be given within six months, that he had done so, he was to pay certain stated damages. Information was given, and the Company brought an action; upon which he filed the bill, alleging, that the time was two months instead of six months.

Aug. 11th. Lord CHANCELLOR [LOUGHBOROUGH] stated the case and delivered his opinion.

I cannot entertain a moment's doubt, that Mr. Barstow is entitled upon the letter against the heir of Mrs. Kilvington to hold one third

(1) 19th Feb. 1734, before Lord Talbot; cited for another purpose by the name of *D'Olliphant v. The South Sea Company*, in *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317. The Attorney General cited it from Lord Talbot's note.

of the estate, as agreed by her to be part of the portion of his wife. The doubt, that struck me, was, whether the letter could go farther, and could aid the other Plaintiff, the second son. The settlement itself is certainly such as never could have been the deliberate intention of the parties making it. There are evident marks of great inaccuracy and great want of skill in the person, who drew it. The consideration of what it ought to be leads one to refer to the letter of the mother. She declares, her agreement was, that the estate should be settled equally among the children for ever.

The Attorney General has furnished me with a very good note (1) of the case of *Jenkins v. Quinchant*; which is confirmed by Lord Hardwicke's own note. It is almost in point: but the letter of Jenkins is not quite so strong as that of Mrs. Kilvington * in this case. Upon the occasion of the marriage of one [* 602] of her children she thinks fit to communicate to the intended husband, what the fortune of her daughter was: and she expressly declares, what her object and view were in the settlement made on her marriage; and it appears, the family had construed it in the manner her intention bore that it should be considered. In that case by a settlement after marriage the husband and wife conveyed to their joint appointment; in default of appointment to them for life; and after the decease of the survivor to the use of all or any of the child and children in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times and in such manner and form, as the husband should by deed or will appoint; and in default thereof to the husband, his heirs and assigns for ever. The wife died; leaving one son. The husband and wife had joined in a mortgage, reciting in the deed this settlement *verbatim*. The husband died without appointment; and under the last limitation, to him and his heirs, he devised to his second wife, the Defendant.

The note goes no farther than that point: but upon looking into Lord Hardwicke's note book I find, the point was raised by himself; for the cause came on originally by a bill by creditors, creditors of the husband, against the widow and the son of the first marriage, the heir at law, for satisfaction of their debts out of the estate; and, the estate being subject to a mortgage, the mortgagee was a party. A cross bill was filed on behalf of the infant; insisting, that upon the construction of the settlement he was intended to have this estate; because the words "in default thereof" must not be construed to mean in default of appointment, according to the just construction of the settlement, being made upon marriage; but must be in default of issue. In the course of the cause it was stated in support of the construction of the infant, that there was a letter written by the husband, directing the attorney, who drew the settlement, in what manner the settlement should be prepared; and that letter expressly directed, that it was to be so drawn, that in case the husband should

(1) Stated, *ante*, in a note, 596.

die without issue by the wife, he himself was to have the power to dispose of the estate, but in no other case. Lord Hardwicke at first very much felt the circumstances pressing him : but also feeling, that he could not put that construction upon the settlement, that would favor the case of the infant, he directed the bill to be [*603] amended ; * charging the letter ; and making that the ground of relief. There were a great many points ; and Lord Hardwicke gave a full opinion, against the infant as to the construction of the settlement, but that the letter controlled the settlement ; and that it was mistake in not following the letter ; and therefore that the effect of the letter was, that the children of the marriage must take the estate ; and the power of the father to dispose of it could only be, if there should be no children. There were two children. Upon the adoption of that letter, as controlling the settlement, Lord Hardwicke decided in favor of the issue against the devisee ; observing that it could not affect the mortgagee, if the parties wished it.

The cases are so very parallel : there is only this difference : that was a letter of instruction prior to the settlement ; which might be equivocal ; as there might be an intermediate alteration of the intention : but this is a declaration made, not loosely, but upon the marriage of one of the children, what the wife's intentions were in an existing settlement ; being also one, which no man of judgment would have made. Therefore I have no difficulty in making a decree in favor of the Plaintiff Henry Medley Kilvington as well as Mr, and Mrs. Barstow. The Plaintiff Barstow claims as a creditor : and therefore is entitled to costs out of Mrs. Kilvington's estate ; for the letter bound her, and those, who take her estate.

Declare according to the prayer of the bill, that the settlement ought to be rectified according to the declaration of the letter of Mrs. Kilvington ; whereby the Plaintiff Barstow in right of his wife is entitled to one third of the estate in fee ; and the other Plaintiff Kilvington is entitled to one other third of the estate ; and they must hold and enjoy, till the infant comes of age ; and then there must be a conveyance.

A SETTLEMENT may be reformed so as to make the operative part thereof conform with the recital by which it is prefaced ; see, *ante*, the note to *Doran v. Ross*, 1 V. 57. This effect being allowed to the recital solely on the ground that it affords evidence of the intention ; the present case went little farther in principle, by holding, that the intention might be collected from documents *dehors* the settlement ; — of course, however, with due caution as to the authenticity, clearness, and weight of such evidence. That Courts of Equity are disposed to be most liberal in their construction of agreements, upon the faith of which marriage has taken place, and in enforcing the execution of such agreements ; see the notes to *Luders v. Anstey*, 4 V. 501.

(1) BYNE v. VIVIAN.

[1800, JAN. 28.]

AN annuity, secured by a bond and a term for years, being void, the memorial not taking notice of the term, and the clause of redemption, and stating the payment of the consideration in money, though it was paid by draft, a general account was decreed of the consideration with interest and costs, and of all money received under the annuity: the balance to be paid to the Defendant, if any, the securities delivered up, and a conveyance. (a)

Where an annuity is set aside, and an action brought for the money, an account is always taken of all money received under the annuity, [p. 608.]

HENRY BYNE, being seised of premises at Mitcham in the county of Surrey for his life, granted to Josiah Vivian an annuity of 15*l.* a-year during the life of the grantor: and by indentures, dated the 9th of July, 1784, Byne demised the premises at Mitcham to Vivian, his executors, administrators and assigns, for 99 years, if Byne should so long live, without impeachment of waste, to secure the annuity out of the rents and profits or by sale of the mortgage; with a proviso for redemption upon six months' notice on payment of 105*l.* for the whole annuity, and in the like proportion for any part, that Byne might desire and give notice to redeem, and all arrears. Byne also executed a bond of the same date, in the penalty of 210*l.* for the payment of the annuity. He gave a receipt at the same time for 105*l.* therein mentioned to have been the consideration.

In 1798 the premises were conveyed by Byne and the other persons interested in them to Powell, to hold to him, his heirs and assigns for ever upon certain uses and trusts.

The bill was filed for the purpose of setting aside the annuity, upon two objections to the memorial of the indenture and bond, registered under the Annuity Act (2): first, that the clause of redemption was not contained in the memorial (3): 2dly, that the consideration was not truly stated (4); being expressed to be paid in money; whereas it was paid by drafts on a banker (5). A third objection was taken at the bar, that the term was not noticed, in the memorial.

The bill charged, that the Defendant advanced only 98*l.* 5*s.* 2*d.* as the consideration. The answer stated, that the Defendant did upon the 9th of July 1784 advance 105*l.* to the Plaintiff by giving

(1) It has been thought convenient to deviate from the course of the dates, in order to bring together this and the four following cases upon the Annuity Act. See the note, *ante*, vol. ii. 36.

(a) 2 Story, Eq. Jur. § 696, § 697.

(2) 17 Geo. III. c. 26, repealed by statute 53 Geo. III. c. 141. See the note, *ante*, vol. ii. 36.

(3) Upon this objection, see *Steadman v. Purchase*, 6 Term Rep. B. R. 737; *Harris v. Stapleton*, 7 Term Rep. B. R. 205.

(4) See *Rumball v. Murray*, 3 Term Rep. B. R. 298; *Berry v. Bentley*, 6 Term Rep. B. R. 690, and the references in the note to the next case.

(5) *Duff v. Alkinson*, *post*, vol. viii. 577, as to drafts drawn by a third person, not mentioned in the memorial.

him a draft received by the Defendant from James Potter upon his bankers. The annuity was paid down to 1795 ; from which time it was in arrear.

The bill suggested, that the Defendant had been in possession of the premises.

The *Attorney General*, [Sir John Mitford], for the Plaintiffs. The memorial does not state the term of 99 years at all, nor the clause of redemption : nor is the payment of the consideration truly stated. All these objections are fatal. It was determined (1) by Lord Chief Baron Eyre and the other Lords Commissioners, that if all the trusts are not inserted in the memorial, that objection is fatal.

Mr. *Mansfield*, for the Defendant. There is nothing in the act requiring the insertion of all circumstances. It has been held lately, I admit, that payment of the consideration by a draft ought to be mentioned. In *The Duke of Queensberry's Case*, (2) the annuity was lost ; because a servant, who had been sent to a banker's with a draft, was not mentioned in the memorial. Several cases before the Court of King's Bench have been put off till next Term, in the hope, that an Act of Parliament will be passed to relieve in fair cases. This was a very honest transaction. The consideration is seven year's purchase.

Another very serious consideration is, whether this Court will entertain a bill to set aside an annuity upon this ground. It is ridiculous to consider this as a bill for an account. There is no foundation for an account upon the bill and answer (3). The Defendant states the sums he has received and the arrears due. It is all consequential upon the Court's exercising jurisdiction by setting aside the annuity. The jurisdiction is founded upon the Annuity Act. This is not a bill to set aside a bond or any instrument on account of a corrupt consideration, which the policy of the law condemns, or of any fraud by the person obtaining the bond ; but upon formal objections under the act, making all the instruments void ; of which the person, who has got the annuity, never can make the least use ; and the grantor cannot be injured, if the instruments are suffered to subsist. The moment any attempt is made to enforce

[* 606] * the annuity, the Court will declare the instrument void ; and if it should go to trial, the moment the instrument is produced there is an end of it. The demise is void. The deed itself expressly shows, the demise was made merely to secure the annuity. Upon an ejectment brought upon this deed the Court might immediately under the terms of the Act interpose on motion. It is impossible to stir a step upon that deed without proving a proper memorial. The Plaintiff then comes into Equity to do that,

(1) *Hood v. Bollon*, ante, vol. ii. 29 ; 4 Bro. C. C. 121.

(2) *Post*, vol. viii. 579.

(3) Mr. Maddock (5 Madd. 417.) states from the Register's Book, that the bill in this case offered the account. It certainly does not appear from the language both of the Bar and the Court to have been so understood.

which might be done on motion, if any proceeding was taken to enforce this annuity.

This bill is wholly different from a bill to set aside a bond or any other instrument given upon a corrupt consideration. Such bills were formerly entertained upon this ground; that the corrupt consideration could not be pleaded at law; that being considered an averment contrary to the instrument: but that has been held by the Court of Common Pleas (1) and afterwards by the Court of King's Bench to have been founded on a mistake of the rule, that an averment cannot be made against a deed; for that only shows the real consideration; and there is no reason why the party should not avail himself of the objection at law, if by the policy of the law the instrument is void. Those cases however are very different from this; proceeding upon a clear ground; that though since those determinations the party might avail himself of the objection at law, yet the evidence might be lost: the witnesses might die; and it would be uncertain, whether he could at a future period prove the corrupt consideration. But in this case the proof lies upon the person, who wishes to avail himself of the instrument. He must produce a memorial; and if he does not, the other party may get a copy of it from the office. This sort of case therefore affords nothing of the principle of *Quia timet*. With regard even to a bond upon a corrupt consideration your Lordship in *Franco v. Bolton* (2) was of opinion, that since that may be insisted on at law, the necessity for the interposition of this Court is gone; and allowed the demurrer. But in this instance the ground for the interposition of this Court does not exist. The instrument is not only void at law, but the party to be effected by it has the proof always in his power. There is no pretence for an account; and the whole foundation of the bill is, that the grant of the annuity is void.

The *Attorney General*, [Sir John Mitford], in reply. Upon all the grounds, upon which this Court proceeds in [* 607] giving this species of relief, a decree must be obtained in this case. The Court of King's Bench did at one time order such instruments to be delivered up to be cancelled: but now they disclaim that jurisdiction. This is an incumbrance upon the estate; which cannot be disposed of, till this term is disposed of. A Court of Equity has taken jurisdiction in cases, where the security has been void at law; as upon usurious contracts. The party has a right to come to have the instrument delivered up. The reason is, that he has a right to have the property cleared; and that the other shall not retain the security, merely to keep a cloud over the title. In *Lord Abergavenny's* Case, the bill was filed for the purpose of getting rid of several annuities. The consideration was really paid, but not in the manner expressed in the memorial. Your Lordship had that point determined in the Court of King's Bench; and upon the

(1) *Collins v. Blantern*, 2 Wils. 341.

(2) *Ante*, vol. iii. 368; but see the note, 371.

decision against the annuity made the decree; holding, that having made a demise of his estate he had a right to have it cleared.

LORD CHANCELLOR [LOUGHBOROUGH]. That is the case, in which it was determined, that, if the mode of paying the money was not exactly as set forth in the memorial, the annuity is bad. I felt a doubt upon that. If a man pays by his clerk, and it is expressed in the memorial to be paid by himself, it does not occur to me, that it would not be good (1). Would it not be as well to revise that determination? It seemed to me, that it never went so far as that the bearer of the note should be considered as the payer. Any attempt at an act of Parliament will be found very difficult.

With respect to this question, there are, I apprehend, several decrees. There can be no doubt, that, though a Court of Law would set aside the judgment, yet if they come to a determination not to meddle with the other securities I must take away the incumbrances; and this Court does it upon equitable terms; considering him as an incumbrancer. It is clear, they would be nonsuited in an ejectment: but still it is an incumbrance. An estate is created; and a charge of 15*l.* a year during the life of the Plaintiff. He must pay the principal, interest, and costs (2).

[* 608] *The *Attorney General*, [Sir John Mitford], said, the sums actually received by the Defendant must be taken into the account.

Mr. *Manfield*, for the Defendant, insisted on the contrary; observing, that the annuity was paid down to 1795; and the Defendant ran the risk the whole of that time.

LORD CHANCELLOR [LOUGHBOROUGH]. The terms of the redemption must be an account of what is due. I consider it as a loan. There is not a single case, where an annuity has been set aside, and an action at law has been brought for the money, in which the account has not been taken. I remember several actions; and the account has always been taken (3).

The decree directed the Master to take an account of what was due to the Defendant for principal and interest, in respect of the sum of 105*l.* paid for the purchase of the annuity, and to tax his costs of this suit; an account of all sums received by the Defendant on account of the said annuity; and it was ordered, that what should

(1) See *Dalmer v. Barnard*, 7 Term Rep. B. R. 248.

(2) *Post*, vol. viii. 135.

(3) In *Weddell v. Lynam*, 1 Esp. N. P. Cases, 309, Lord Kenyon appears to have ruled, that in an action brought by the grantee of an annuity, void under the Act for defects in the memorial, to recover the consideration, the grantor is entitled under the general issue to an allowance of all payments made on account of the annuity and all expenses incurred upon it. But in the previous case of *Beauchamp v. Borret*, Peake's N. P. Cases, 109, his Lordship is stated to have held, that the payments under the annuity were not to be allowed. That case probably turned upon the special agreement. In *Hicks v. Hicks*, 3 East, 16, they were considered to be subject to the Statute of limitations, if the Plaintiff by his replication had claimed the benefit of it. See *post*, vol. vii. 23; *Holbrook v. Sharpey*, xix. 131.

be found due from the Defendant be deducted from what shall be found due to him for principal, interest, and costs; and upon the Plaintiff's paying to the Defendant what, if any thing, shall remain due to the Defendant for principal, interest, and costs, within three months after the report, or in case it shall be found, that the Defendant hath been fully satisfied, it was ordered, that the Defendant deliver to the Plaintiffs the said indenture and bond to be cancelled; and also convey the premises free and clear of all incumbrances by him or any person claiming under him, out of which the annuity was payable, or as he shall appoint; and deliver all deeds, &c.; and in case it shall appear, that the Defendant has been overpaid, it was ordered, that he pay such overplus to the Plaintiff; and if the Plaintiff do not so pay what, if any thing, shall appear to be due to the Defendant, it was ordered, that the bill should be dismissed with costs (1).

1. THAT a Court of Equity has jurisdiction to order an annuity deed to be delivered up, when the memorial is defective, is now perfectly established: *Dupuis v. Edwards*, 18 Ves. 360; *Underhill v. Horwood*, 10 Ves. 218; *Bromley v. Holland*, Coop. 20: and the intent of the Annuity Acts, it has been declared by Lord Eldon, is, that the memorial should express by whom, on whose behalf, and in what particular way, the consideration was paid; if the payment be made by a draft, at sight even, upon a banker, the circumstance of payment *eo modo* must be set forth. *Duff v. Atkinson*, 8 Ves. 582, 583; *Poole v. Cabanes*, 8 T. R. 330; *Phillips v. Crawford*, 9 Ves. 220.

2. That a defendant, whose annuity has been set aside, on whatever grounds, cannot resist an account of sums received by him in respect of such invalid contract, seems well settled by the principal case; and as the plaintiff in this case had by his bill offered to account, on his part, for the consideration actually received by him, (a circumstance which though it does not appear on the face of this report, Mr. Maddocks ascertained by an examination of the Register's Book, see 5 Mad. 417, n.) there could be no doubt as to the propriety of directing the whole account to be taken. But if no such offer had been made by the plaintiff, it may be questioned, whether the Court could have imposed terms upon him, as a condition of relief against an instrument repudiated by the policy of the legislature; and whether it would be right, in such a case, to fasten on the conscience of the grantor, holding him bound by his contract, notwithstanding the statute; (*Davis v. The Earl of Strathmore*, 16 Ves. 428;) the principle of relief being, not redemption, but the invalidity of the grant. *Bromley v. Holland*, 7 Ves. 24. No doubt, if the grantor of an annuity seek to set it aside on equitable grounds, alleging that the grant was obtained by fraud, extortion, or undue influence of any kind, there, (upon the well known principle, that he who asks relief against fraud, should not himself act fraudulently, *Rowe v. Wood*, 1 Jac. & Walk. 333,) it is obviously just that the applicant should engage to return the consideration he received for his grant: *Aguilar v. Aguilar*, 5 Mad. 416; *Davis v. The Duke of Marlborough*, 2 Swanst. 166: but if the application be to have the annuity deed delivered up, not upon any of the grounds which might bring the matter within the jurisdiction of a Court of Equity with reference to its own peculiar doctrines, and as to the exercise of which it necessarily must be left to its own discretion, but on proof that the deed is absolutely void under the statute, it should seem, the plaintiff would be entitled to that relief, without accounting in that suit for the consideration he received for the annuity; (*Bazzelgetti v. Battine*, 2 Swanst. 156, n. 157;) leaving the annuitant to proceed at law, where the questions of fact could be best investigated. *Shove v. Webb*, 1 T. R. 735; *Scarfild v. Gowland*, 6 East, 241; *Williamson v. Gould*, 1 Bing. 241. It is certainly now settled, that

(1) See the four following cases, the note, *ante*, vol. ii. 36, and *Holbrook v. Sharpey*, post, xix. 131, in which case this decree was taken as a precedent.

whenever an annuity is set aside, the purchase money may be recovered at law: *Low v. Barchard*, 8 Ves. 136: and it is not meant to be denied that there are *dicta* declaring it to be equally the rule of Courts of Equity; but in the very cases where that was said to be the rule, its propriety has been most strongly impugned. *Jones v. Harris*, 9 Ves. 492. Its universality, at all events, must be restricted; for instance, a *feme covert* may file a bill, as plaintiff in a suit to set aside an annuity, without offering to return the price she received for it; and, since at law no action would lie against her, in respect of a demand founded on mere general contract and engagement, by analogy, a Court of Equity would refuse to fasten upon her property equities arising out of general contract and engagement only. *Aguilar v. Aguilar*, 5 Mad. 418; *Angell v. Hadden*, 2 Meriv. 169. If the grant were valid, Equity would apply her separate property in payment of an annuity which she had expressly charged upon it; for, in such a case, a Court of Equity alone could give the requisite relief: *Essex v. Atkins*, 14 Ves. 546; *Power v. Bailey*, 1 Ball & Bea. 52; *Greatley v. Noble*, 3 Mad. 94: but the Court will not apply her separate property in repayment of the consideration money, a demand with which she has not charged it. *Stuart v. Lord Kirkwall*, 3 Mad. 380: *Aguilar v. Aguilar*, 5 Mad. 418. If the grantor of a defective annuity be defendant, a Court of Equity would have no more right to interfere, to direct the consideration money to be returned, than if the grantee's demand were for an ordinary debt; *Duke of Bolton v. Williams*, 4 Brown, 310; *Jones v. Harris*, 9 Ves. 494: and the only remedy should seem to be by an action for money had and received. *Hicks v. Hicks*, 3 East, 16; *Holbrook v. Sharpey*, 19 Ves. 133. Even if the due execution of the deed and memorial was prevented by fraud, the right of the party injured to equitable relief appears extremely questionable; if any analogy may be drawn from the decisions under the ship register acts. *Mestaer v. Gillespie*, 11 Ves. 626; *Thompson v. Leake*, 1 Mad. 43; *Thompson v. Smith*, 1 Mad. 406; *In re Ship Warre*, 8 Price, 274. It is true that in one case, where a grant of an annuity was void, for want of a memorial registered, and the grantor and grantee stood in the relation of solicitor and client; the Lord Chancellor, sitting in bankruptcy allowed the grantee to prove a debt in respect of the money by him advanced, against the estate of the insolvent grantor, reserving the dividends; but, at the same time, the demand was declared to be wholly untenable as an annuity transaction. The proof was allowed, in respect of money advanced by a client to his confidential man of business, for a purpose which, by the agent's fraud and negligence, failed; and to have left the employer to his action for money had and received, after all the agent's effects had been assigned under the commission against him, would probably have been nugatory; there was also another ingredient in this case, the party advancing the money had in his possession the title deeds of the estate upon which the proposed annuity was to have been secured; and, though it was doubtful whether he might be able to establish his claim as an equitable mortgagee, yet the Lord Chancellor would not order the deeds to be taken out of his hands: this was a strong inducement to the assignees to accede to the compromise which the Court recommended: *Ex parte Wright*, 19 Ves. 258: for there may be many cases in which the right to retain possession of title deeds may be maintained against all parties who may become owners of the estate: *Ex parte Hooper*, 19 Ves. 479: even in circumstances where the deposit does not give an actual lien on the estate: *Ex parte Wetherell*, 11 Ves. 401: and this consideration may fairly be presumed to have had weight in inclining the assignees in *Ex parte Wright*, to consent to a compromise. It may be observed, that in that last cited case, the claim would have been still more clearly indisputable, if the transaction upon which it was founded had been more incomplete than the agent's culpable negligence left it. The annuity in *Ex parte Wright*, was not only granted, but it was, until the time arrived when a memorial was necessary, and there was a default in not registering one, a title actually subsisting, and defeated only by relation upon the subsequent default. Had the matter rested entirely in agreement, it would not have been within the Annuity Act; no question therefore could have been made as to the right of taking a dividend in respect of the money advanced, when the execution of such agreement, though not enrolled, might have been enforced in Equity, had the proposed grantor continued solvent: *Nield v. Smith*, 14 Ves. 491: as, on the other hand, but on the same principle, a grantee, who has contracted for the purchase of an annuity, must pay the consideration,

even although the person for whose life the annuity was to be granted, be dead before the grant is completed. *Jackson v. Lever*, 3 Brown, 614; *Pritchard v. Ovey*, 1 Jac. & Walk. 403. The enrolment of an agreement to grant an annuity would be merely superfluous; since no action at law could be maintained thereon, for to constitute a legal annuity deed, there must be positive words of immediate and present grant. *In re Locke*, 2 Dow. & Ryl. 607. Neither does an assignment of an annuity, when the transaction is merely by way of sale, without any collateral stipulation, require enrolment. *Brown v. Lake*, 14 Ves. 306. Nor do the Statutes render enrolment necessary to give validity even to the actual grant of an annuity, except in cases where the annuity is sold for valuable consideration. *Blake v. Altersoll*, 2 Barn. & Cress. 879. An annuity charged upon an equity of redemption of a mortgaged estate is within the exception in the Annuity Act. *Tucker v. Thrustan*, 17 Ves. 131.

3. In *Holbrook v. Sharpey*, 19 Ves. 134, the account was directed between the grantor and grantee of an annuity, which was set aside for want of a memorial duly registered in the same terms as in the principal case; in both instances it was the grantee who resisted the account; and in both, the grantor offered to repay the consideration money, with legal interest.

BYNE v. POTTER.

[* 609]

[1800, MARCH 6.]

BILL to set aside an annuity, secured by a term for years and a bond, upon objections to the memorial for not containing a clause of redemption, for not stating the consideration truly, and other defects, the Defendant admitting, he had received more than was due to him for principal and interest, the securities were decreed to be delivered up to be cancelled with costs. (a)

By indentures, dated the 2d of July 1784, the Plaintiff Henry Byne granted an annuity of 45*l.* a-year to James Potter, secured as in the preceding case, by a term for years and a bond. The consideration was the Plaintiff's promissory note to the Defendant for 100*l.* advanced upon the 15th of June preceding by the Defendant's draft on his banker, which note was given up, a draft for 206*l.* 11*s.* 8*d.*, and 8*l.* 8*s.* 4*d.* paid to the attorney for the expense of the transaction. The Plaintiff also entered into a covenant upon the 9th of July to renew a lease to the Defendant as a farther security.

The bill was filed against the executor of Potter (1) upon several objections:

1st, That a clause of redemption was not set forth in the memorial:

2dly, The consideration stated by the memorial was 315*l.* paid: no notice being taken of the promissory note, that was given up; or of the agreement for renewal; which was part of the consideration (2):

(a) See *Bromley v. Holland*, *post*, 7 V. 3, and notes, and cases cited.

(1) *Ante*, 305.

(2) *Jacques v. Wilby*, *Shove v. Webb*, 1 Term Rep. B. R. 557, 732; *Kirkman v. Price*, 1 H. Black. 309; *Ex parte Ansell*, *Morris v. Cesall*, 1 Bos. & Pul. 62, 208, and the references in a note to the preceding case.

3dly, The attorney's bill of 8*l.* 8*s.* 4*d.* was deducted (1):

4thly, The Defendant being tenant of the premises deducted the annuity out of his rent; by which means he was paid in advance.

The decree declared, that, the Defendant admitting, he had received more than was due to him for principal and interest, the deed and bond, dated the 2d of July 1784, and the deed of covenant of the 9th of July 1784, ought to be set aside and delivered up to be cancelled, and all papers, &c., belonging to the Plaintiff: and that the Defendant pay the Plaintiff the costs of the suit (2).

1. See the notes to the last preceding case.

2. Though no directions were given in this case as to the surplus moneys received by the grantee, yet it seems that the balance, which ever way it turns, must be paid by the party indebted. *Holbrook v. Sharpey*, 19 Ves. 133; *Byne v. Vivian*, 5 Ves. 608.

(1) *The Duke of Bolton v. Williams*, ante, vol. ii. 138.

(2) See the preceding and the three following cases. The costs, it is said, were given in this case upon a special ground arising out of the circumstances, that the Defendant had been the attorney. *Post*, *Bromley v. Holland*, vol. vii. 3, upon the appeal; and *Holbrook v. Sharpey*, xix. 131; where the difference between this decree and that of *Byne v. Vivian* is accounted for by supposing, that this Plaintiff did not press for the account; but was contented to take his costs as a set-off against the admitted over-payment. In *Duff v. Atkinson*, post, viii. 577, the Lord Chancellor refused costs; the grantor not taking the objection, till the consideration was repaid, and the chance turned against him.

BROMLEY v. HOLLAND.

[ROLLS.—1800, JUNE 23, 27, 30; JULY 4.]

ANNUITY void, the memorial not containing the clause of redemption, not stating the consideration truly, and being otherwise defective, was set aside by the decree: (a) but the Plaintiff having failed in two applications to the Court of King's Bench upon some of the objections, and having in the interval been a party to the assignment to the Defendant, the account was confined to the filing of the bill. The defendant was held entitled to the original consideration, though exceeding the sum paid on the assignment. (b)

The refusal of a summary application to set aside an annuity is no objection to the same ground being taken again upon an attempt to enforce it, [p. 617.]

The cases, in which equity orders instruments, to which there is a legal objection, to be delivered up, are rare, and the relief on terms, (c) [p. 618.]

By indentures, dated the 16th of May, 1788, the Plaintiff in consideration of two several sums of 300*l.* granted two annuities of 50*l.* each to Samuel Greathead; and demised the rectories of St. Mildred and St. Mary Colechurch to Tyrrell for ninety-nine years (1), if the Plaintiff should so long live and continue the rector, upon trust, among other purposes, to secure these annuities. The deeds contained clauses of redemption; and it was provided, that the expense of the deeds and writings should be paid by the Plaintiff; and that two former annuities of 25*l.* a-year each, granted by him to Golightly and Prout, should be redeemed out of the purchase-money.

In April, 1792, Greathead assigned the annuities to Thomas Peacock, in consideration of 500*l.* and a farther sum, somewhat less than the arrears then due. In 1794 the Plaintiff moved the Court of King's Bench to set aside the annuity upon an affidavit, stating, that in the negotiation Tyrrell acquainted him, that 40*l.* had been

(a) 2 Story, Eq. Jur. § 696, § 698, § 700-702; *Ryan v. Mackmath*, 3 Bro. C. C. (Am. ed. 1844,) 18, note (a), and cases cited.

The whole doctrine of Courts of Equity on this subject is referable to the general jurisdiction, which it exercises in favor of a party, *quia timet*. It is applied, even in cases of forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery. *Peake v. Highfield*, 1 Russ. 559; 2 Story, Eq. Jur. § 701. See also *Hamilton v. Cummings*, 1 Johns. Ch. 520-524; *Simpson v. Houden*, 3 Mylne & Craig, 104, 105; *Piersall v. Elliott*, 6 Peters, 95; *Pettit v. Shephard*, 5 Paige, 493; *Torrey v. Buck*, 1 Green. Ch. 367; *Jones v. Perry*, 10 Yerger, 59; *Leigh v. Everhart*, 4 Monro, 380; *M'Meeekin v. Edmonds*, 1 Hill, Ch. 295.

(b) If a plaintiff has the assistance of a Court of Equity to set aside a *usurious* contract, it must be on the terms of repaying the sum really advanced with legal interest. *Scott v. Nesbit*, 2 Bro. C. C. (Am. ed. 1844,) 641, 649, notes. See the doctrine stated and the reasons of it in 1 Story, Eq. Jur. § 301; Fonbl. Eq. b. 1, ch. 1, § 3, note (h); *Jordan v. Trumbo*, 6 Gill & John, 103; *Fulton Bank v. Beach*, 1 Paige, 429; *Crawford v. Harvey*, 1 Blackf. 382; *M'Daniels v. Barnum*, 5 Vermont, 279; *Fanning v. Dunham*, 5 Johns. Ch. 142, 143, 144; *Rogers v. Rathbun*, 1 Johns. Ch. 367.

(c) See the cases cited in notes (a), and (b), above.

(1) This term was afterwards assigned to Flashman. See the Report of the Appeal, *post*, vol. vii. 3; and it appears there, that Oakden was in the receipt of the rents and profits under a power of attorney.

expended in soliciting the purchase of the annuity ; which sum was deducted ; and the consideration-money was not paid wholly to the Plaintiff, but was participated by Golightly and Prout ; and was paid by the drafts of Tyrrell ; and neither the whole purchase-money nor either of the sums due to Golightly and Prout were offered to the Plaintiff. A rule to show cause was obtained ; which was afterwards discharged with costs. In February 1795 Peacock assigned to Arabella Holland ; and by indentures, dated the 1st of June, 1795, to which the Plaintiff was a party, it was declared, that Richard Oakden, then in the receipt of the profits of the rectories under a demise (1), dated the 20th of June, 1794, upon trust to pay an annuity of 50*l.* a-year granted by the Plaintiff to Ralph Oakden, should apply the profits, after paying the curate's salary, in satisfaction of the annuity of 100*l.* a-year, assigned to Arabella Holland, as well as the said annuity of 50*l.* a-year.

In Michaelmas Term 1797 the Plaintiff again moved the Court of King's Bench upon grounds in substance the same as before ; * and the rule obtained by him on that occasion was also discharged with costs (2).

The bill was filed upon the 18th of June 1798 ; praying, that the indentures of 1788 and the bond and warrant of attorney and the indentures of the 1st of June 1795, securing the annuity of 100*l.* a-year, may be declared void, and decreed to be delivered up ; and that the Defendants Tyrrell and Richard Oakden may re-assign the trust terms they hold in the rectories for payment of the annuity ; the Plaintiff offering to pay what, if any thing, shall remain due from him in respect of the sum originally advanced for the said annuity and legal interest. The grounds, upon which this relief was sought under the Act (3), were, as stated by the bill, that in the memorial no notice was taken of the clause of redemption, of the poundage reserved to Tyrrell upon collecting the profits, the agreement for satisfying the expenses of the negotiation and the indentures of the 1st of June 1795 ; that the indentures and the memorial express the consideration of 600*l.* to have been paid in money ; whereas it was in fact paid by the drafts of Tyrrell : Greathead having left the house before the deeds were executed ; and Tyrrell giving his drafts to Golightly for 158*l.* 11*s.* 6*d.*, and to Prout for 165*l.* 16*s.* for their purchase-money and arrears ; which two sums were part of the consideration mentioned in the indentures to be paid by Greathead ; and the Plaintiff received from Tyrrell his draft for 275*l.* 12*s.* 6*d.* being the residue of the 600*l.* ; which the Plaintiff received ; and paid thereout 40*l.* either to Tyrrell, Greathead's attorney, or to Creagh, the money-broker, who introduced the Plaintiff to Tyrrell, for the expense and premium of the negotiation. The

(1) See note (1) in the preceding page.

(2) *Greathead v. Bromley*, 7 Term Rep. B. R. 455. See also *Hart v. Lovelace*, 6 Term Rep. B. R. 471 ; *Schumann v. Weatherhead*, 1 East, 537.

(3) 17 Geo. III. c. 26, repealed by 53 Geo. III. c. 141. See the note, *ante*, vol. ii. 36.

bill farther stated, that the drafts of Tyrrell are not specified in the indentures or the memorial; and both those instruments express the consideration to have been paid by Greathead; whereas it was paid by Tyrrell, as above-mentioned; and they also state it to have been wholly paid to the Plaintiff.

The answers stated, as to the payment of the consideration, that Greathead delivered two bank-notes for 300*l.* each to Tyrrell; and left the room, before the deeds were executed. After the *execution Tyrrell delivered the two notes to the Plaintiff; [*612] who observed, that with those notes the respective considerations could not be distributed to each party without change; upon which the mode of settling it by Tyrrell's drafts was adopted, and approved by the Plaintiff; and at his request and to accommodate him Tyrrell received 20*l.* and three guineas for his bill of costs. They admitted, that there was no memorial of the deed of the 1st of June, 1795; that the drafts of Tyrrell are not specified in the memorial; that it expressed the consideration to have been paid in money, and by Greathead, and wholly to the Plaintiff; and that it does not notice the clause of redemption, nor the specific trusts of the indenture, nor the covenant for poundage reserved therein, nor any agreement for satisfying the expenses and premium of the negotiation.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] intimated considerable doubts as to the jurisdiction of a Court of Equity upon legal objections; especially after the applications, that had been made to a Court of Law.

Mr. Piggott and Mr. Leach, for the Plaintiff. The application to the Court of King's Bench was merely upon the manner, in which the consideration was paid: but that application had no reference to this clear objection, repeatedly decided, which is admitted by the answer; that the memorial takes no notice of the clause of redemption. It is not necessary to go beyond that plain, palpable, objection; but there are many more, besides that, which was the subject of the application to the Court of King's Bench. The decision upon the omission of the clause of redemption in the memorial took place after the Plaintiff's first application to the Court of King's Bench. *Steadman v. Purchase* (1) was determined in 1796.

With respect to the jurisdiction, in *Forster v. Davenport* (2) the Plaintiffs were the grantors of an annuity of 20*l.* a-year; and the relief was given; and the account directed: though the grantors had moved the Court of King's Bench to set aside the annuity; and the rule they obtained was discharged after a full hearing of the merits; and a second application was also discharged, but upon precisely the same ground as in this case; that one *summary application being discharged, the Court would [*613] not entertain a second. *Byne v. Vivian* (3) and *Byne v.*

(1) 6 Term Rep. B. R. 737.

(2) At the Rolls, 18th March, 1797.

(3) *Ante*, the last case but one.

Potter (1) are decisive authorities as to the jurisdiction. This is the case of a trust. The deed of 1795 comprises many other trusts. The Plaintiff must come into this Court. He has no remedy any where else. The interposition of this Court is necessary for the indemnity of the trustee. The incumbrance upon the estate must be removed. There can be therefore no doubt of the jurisdiction.

This point, upon which this annuity is clearly void, has again been under the view of the Court of King's Bench in *Harris v. Stapleton* (2) and another case determined upon the same ground since. In *Hood v. Burlton* (3) Lord Commissioner Eyre lays it down, that all the instruments, by which an annuity is secured, ought to be registered. There would otherwise be great opportunity of collusion; for the consequence of confining the memorial to the deed granting the annuity would be, that the principal deed would be made after the enrolment. The object of the Act was, that it should be publicly known, how the party was dealt with, not in the payment of the consideration only, though that is a material ingredient, but also in every circumstance of the transaction. The application to the Court of King's Bench was upon the fourth section of the Act respecting the 40*l.* returned to Tyrrell; and it is only to cases upon that section that the summary jurisdiction of the Court of Law applies. But this is another objection, upon the first section. In *The Duke of Bolton v. Williams* (4) it was insisted, that only the deed, as to which the memorial was defective, should be set aside; but the Lord Chancellor held the contrary; and the whole was affected; and all the securities, being one assurance, must be delivered up; and that has been followed by the Court of King's Bench in *Hart v. Lovelace* (5).

Mr. *Richards* and Mr. *King*, for the Defendant. This bill does not lie, after two applications to the Court of King's Bench by the Plaintiff upon every objection he thought material; the rule in both having been discharged with costs. The latter application was made a considerable time after the decision of *Steadman v. Purchase*; and

was upon the same grounds in substance as the former.

[* 614] * This bill states the very objections made upon those applications. Perhaps the objection upon the clause of redemption was not expressly taken: but it appears by the Report, that upon the second application the Counsel said, they had new matters to offer; probably alluding to this objection. This is a species of appeal from the decision of the Court of King's Bench; and the Plaintiff now calls upon this Court to declare that void; which, if he is right, the law has already declared void; for upon this objection the deeds are void, not merely voidable. The Court of King's Bench have declared this not void. This Court cannot

(1) *Ante*, the last case.

(2) 7 Term Rep. B. R. 205.

(3) 4 Bro. C. C. 121; *ante*, vol. ii. 29.

(4) *Ante*, vol. ii. 138.

(5) 6 Term. Rep. B. R. 471.

declare it void without sending it to law. In *Davidson v. Lord Foley* (1), Lord Thurlow directed a motion to be made in the Court of Common Pleas to set aside the warrant of attorney. This is a legal, not an equitable question. *Foster v. Davenport* does not apply to this subject: that being a question of redemption; and there was, I believe, an agreement afterwards for commuting the annuity for a sum of money. The cases of *Byne v. Vivian* and *Byne v. Potter* appear extraordinary. Where no discovery is necessary, which draws relief with it, where there is nothing but a dry point, there is no other instance of such a bill. With respect to the deed of 1795 has it ever been decided, that if the grant of an annuity is properly registered, and many years afterwards another deed is executed, which is not registered, that shall vitiate the whole? *Hood v. Burlton* does not prove any thing like that.

Mr. Piggott, in reply. Upon the clause of the Act of Parliament it is plain, the application to the Court of King's Bench must have been upon the payment of the consideration. The summary application to a Court of Law is given in specified cases, and no others; and is intended for the benefit of the grantor; not to shield the grantee from any other application to a Court of Justice upon different grounds; upon which the grantor is obliged to return all the money he has received, with interest, in order to sustain his application; which is by no means the case upon the summary application. It is impossible for Courts of Law to give any direction about the securities: their power to give up the securities being confined to the specified cases in that clause; which relates to the payment of the consideration; and has no reference to this objection. They can vacate the judgment; but *cannot [*615] direct the securities to be delivered up, except in the specified cases. *Appleby v. Smith* (2); and the cases stated in the note to that case. In *The Duke of Bolton v. Williams* the Lord Chancellor adopts the distinction, that every original deed securing an annuity must be stated in the memorial; and the want of that as to any one vacates the whole. It is clear also from that and the other cases, that the Court of King's Bench can exercise no such jurisdiction as this bill prays, and which this Court is in the habit of giving. What is there to be tried at law? The fact is admitted; and then the decree follows of course: *Newman v. Milner* (3), *Lisle v. Liddle* (4): a trial at law being superfluous; which would have been the utmost, that could have been had, if the case had been contradicted by the answer. The last deed is a security for an annuity granted previously; and as such is within the act. The Court will never make such a construction as will enable parties to defeat the act by making a subsequent security to be the effectual security. If that, which is the effectual security, is not within the

(1) 3 Bro. C. C. 598; 2 H. Black. 12.

(2) 3 Anstr. 865.

(3) *Ante*, vol. iii. 483; *Jervis v. White*, *post*, vii. 413.

(4) 3 Anstr. 649.

act, because not coeval in point of date, how is the object, to make the transaction known, to be obtained? In the view of the act every such security is a new assurance.

In *Franco v. Bolton* (2), the single authority cited in *Byne v. Vivian* against the jurisdiction, the Defendant had pleaded the corrupt consideration, which may now be done (1); and the bill was nothing more than an appeal from the verdict. The very question had been tried at law previously to the institution of that suit. The relief sought here is beneficial to the Defendant. The Plaintiff cannot come without doing that justice, which the Defendant could not obtain at law (3), a general account of all money received and paid under the annuity.

The MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. In *Forster v. Davenport* the bill was founded upon the clause of redemption. This bill seeks to set aside the annuity upon payment of principal and interest only. I have great doubts still, whether such a bill as this can be sustained. This Plaintiff comes upon a legal objection to have these securities delivered up, after two unsuccessful applications to the Court of King's Bench. He shall not now avail himself of any objection, that was the ground of application to the Court of King's Bench. *Byne v. Vivian* is certainly a [* 616] very strong authority in favor of the *interposition of this Court; and goes farther than I am inclined to go. If the Court does interpose, it must be upon fair and reasonable terms. This is a very hard case. It is the case of an assignee, not a dealer in annuities, having advanced her money with the concurrence of the Plaintiff; who after two unsuccessful attempts at law, now comes upon a legal objection, as to which great doubts have been entertained; though the point must now be considered settled. I will not disturb any payments made, before the bill was filed. The decree I should propose to make is to direct an account of the sum paid by the Defendant Arabella Holland upon the assignment of the annuity, with interest from the time of filing the bill, and an account of the sums received by her since that time. But there can be no justice in making her repay sums received, before the objection was taken. If *Byne v. Vivian* had not been cited, I should not have gone so far.

July 4th. The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This was in effect a grant of an annuity of 100*l.* a-year, in consideration of 600*l.* No objection seems to have been made, at least none, upon which there can be any foundation for relief in this Court, with regard to the terms, upon which the annuity was granted; six year's purchase. It was unquestionably a very good bargain to the purchaser: but it is very well known, that is about the market price: annuities being scarcely ever granted but by distressed per-

(1) *Ante*, vol. iii. 368. See the note, 371.

(2) *Collins v. Blantern*, 2 Wils. 341.

(3) See *Byne v. Vivian*, *ante*, 604, and the notes.

sons. There is no foundation therefore for relief in equity on that ground.

The annuity was paid, or at least, was not questioned, till 1794 ; and then an application was made to the Court of King's Bench under the Act of Parliament for several informalities, omissions and defects, in the memorial. Upon that application, without entering into the questions before the Court of King's Bench, it is enough to say, it appears, the Court thought fit, to reject it ; and subsequent to that rejection the transaction, which this bill seeks to impeach, as against the Defendant Holland, took place ; an assignment to her in consideration of a less sum than what was originally advanced : but it is not quite clear, what that sum was. It is alleged on the one part to be less than 600*l.* and I rather think it is admitted to be so by the answer, which states, that the first assignee, who assigned to the Defendant, did not give the * whole sum [* 617] the original grantee had given, but gave only 500*l.* and a farther sum, somewhat less than the arrears then due. Subsequent to this assignment, some time after it, the Plaintiff himself became a party to it by directing the trustee of the term to pay the profits in satisfaction of this annuity also. After that a second application was made to the Court of King's Bench either upon the same or other grounds (1). I will take it, that the second application contained no other ground. This bill is certainly to be considered, not as seeking to set aside this annuity on the grounds, on which the Court of King's Bench was called upon ; at least I will lay those totally out of the case ; but upon grounds, that did exist at that time ; and, instead of going to that or any other Court of Law, this bill is filed to set aside this transaction and undo it from beginning to end ; for that is the relief prayed.

As far as any legal objection arises, I will not now enter into the question, how far the result of a summary application to set aside the annuity may be used in order to repel any defence, that may be made to an action brought to enforce it : but I am of opinion, the refusal of a summary application would not be any objection to the same ground being taken again, whenever it was sought to enforce the annuity (2). But, be that as it may, this bill is now brought, not only to take away the right to enforce the annuity, but to set aside the transaction, and compel the Defendant to refund. If the case of *Byne v. Vivian* had not been produced, I confess, I should have thought, that upon this Act the remedy ought to have been entirely at law ; and this Court ought not to have interfered : but that case does unquestionably furnish a precedent for the interference of this Court ; and in conformity to that authority I shall proceed to consider, how far and to what extent the Plaintiff is entitled to relief. I have already stated, that this relief is not prayed upon any fraudu-

(1) There was some dispute at the bar, whether the second application was upon grounds in substance the same with the first ; but so it was admitted in the answer.

(2) *Angell v. Hadden*, 2 Mer. 164.

lent circumstances, either circumvention, surprise, undue advantage taken of necessity, or any of those grounds, upon which Courts of Equity, and only Courts of Equity, can interfere. The ground is merely a legal informality, not proved, though said to have been known to the assignee or grantee. There was no wilful default or neglect on the part of either the grantee or the assignee; and the

Plaintiff seeking to avail himself of that legal defect comes
 [*618] to set aside the transaction in * equity; and to be repaid all he may have overpaid. There is a clause of redemption in this deed; which is favorable to the grantor. I am of opinion, that upon the state of this case the Plaintiff has no right to any relief in equity beyond that, which is given by that clause; with this exception only; that from the time of filing the bill, or from the time he gave notice and was ready to redeem, he is entitled to relief. It would be a degree of injustice in a Court of Equity to undo so much of the transaction as upon a fair dealing had taken place previously to the filing of the bill. When in equity the Plaintiff states a legal objection, the answer very often is, "Go, and avail yourself of it at law: a Court of Equity will not interfere, if there is no injustice in the transaction." I do not deny, that in some cases, in order to avoid suits, and prevent the party being harassed, equity will order the instruments, that may be the subject of those suits, to be delivered up (1): but those cases are very rare; and the relief is always upon terms. It does not follow, that, because the transaction is to be set aside, payments are to be retracted. A very extraordinary case occurred lately in the Court of King's Bench: *Howson v. Hancock* (2). If a Court of Law will not permit money paid upon an illegal transaction, I do not mean of a grossly immoral nature, but where an objection might have been taken, to be refunded, it would be extraordinary in this case and under these circumstances for a Court of Equity to make an assignee refund all the arrears received upon this transaction; merely because a legal objection was behind; which was not brought forward, till after those applications to the Court of King's Bench had failed, and those arrears were incurred. Apply the principle of that case in the Court of King's Bench, as between *participes criminis*, as it may be said, to the case of two men dealing *bona fide* for valuable consideration; the one purchasing, the other selling; and intending at the time to sell an annuity: otherwise he would be guilty of a fraud. I do not object to this Plaintiff shielding himself at law from an action: but, when he comes into equity, I say with Lord Kenyon, the transaction is not against conscience; and, if not, unquestionably a Court of Equity will not interpose. Suppose, money had been paid on a bill of exchange not stamped: would this Court compel repayment?
 [*619] Could such a bill be endured for a moment? I confess, I see no difference. This is a legal objection; * and the

(1) See *Newman v. Miner*, ante, vol. ii. 483. [See note (a).] *Jarvis v. White*, post, vii. 413, and the note, 414.

(2) 8 Term Rep. B. R. 575.

same rule would apply as in the case of a bill of exchange, which the party might have avoided paying, because not drawn upon the proper stamp.

When I say this, it is with a view to show, why I do not interpose in equity to give the whole relief prayed. This Plaintiff had a legal objection under the Act. If he had brought that forward, before he had made any payment, I am bound to say after the case of *Byne v. Vivian*, that a Court of Equity, as well as a Court of Law, would interfere; and in this case I am told it is necessary; as the trustee is in possession; and there are other trusts; to which there is no objection. But the question is, upon what terms: always in equity upon doing fair justice between both parties; which in my opinion is not to disturb any payment *bona fide* made before notice. Another strong ground is, that this is the case of an assignee, not of the grantee. Suppose, any advantage had been taken of distress, or any improper bargain made: that could not affect the assignee; who finds the grantee in possession of the annuity; and purchases that; and the grantor ratifies and confirms it; and undertakes to pay. He has a very slender equity; saying, he ratified the assignment; but now finds, the original grant is void. This case differs from *Byne v. Vivian* in that circumstance. That was the case of the grantee. But I do not refuse the relief upon that ground; for I fear, that would put an end to the policy of this very wise Act; as the annuity would be assigned over in order to put an end to any objection. That Act is very useful; though a very oppressive use has been made of it. One very strong argument, which I wish to be noticed as one of the grounds of my judgment, is this. The reason why a Court of Equity ought not to interfere in such cases but upon doing complete justice, and not undoing transactions, that have taken place before notice of the legal objection, is, that gross injustice might arise; for the other party has been running the risk. The life might have dropped. Then these objections would not have been taken, and the party would have lost all his money.

I have changed my opinion as to the terms of the relief; for, I think, I should not do justice, unless I make the decree upon repayment of the whole sum of 600*l.*; though there is a small difference between that and the sum paid upon the assignment. I
 *consider it is an assignment of an annuity of 100*l.* a- [* 620]
 year, redeemable upon the repayment of 600*l.* with the arrears to that time. I consider the Defendant as having purchased that annuity; and all payments made, before the objection was taken, are such as a Court of Equity cannot order to be repaid. There was nothing illegal or immoral in the receipt of them; though the payments could not have been enforced. The only decree I feel myself at liberty to make is for a redemption on payment of the whole sum, unless the Defendant will consent to take the money advanced by her (1).

(1) So a creditor, who buys in an incumbrance, although he does not give the full value, shall be allowed the whole, even against another incumbrancer: but

The Defendant Holland not pressing for more than the sum paid by her, the decree directed an account of all sums of money paid by her as the consideration of the assignment of the annuity to her; with interest at 5*l.* per cent. from the time of filing the bill (1); and an account of all sums received by her or for her use on account of the annuity, since the time aforesaid; and on payment of the balance with the costs of the suit by the Plaintiff, that the securities should be delivered up, and satisfaction acknowledged, &c.; and in default of payment within six months the bill to be dismissed (2).

1. See the notes to the two last preceding cases.

2. The rejection of a previous summary application to a Court of Law, to set aside the annuity which became the subject of the present suit, was in *Angell v. Hadden*, 2 Meriv. 168, again held (conformably to the principal case) to be no ground for refusing relief in Equity, upon a bill filed. The plaintiff in the principal case, as in *Byne v. Vivian*, offered to account.

3. That it may be a very salutary exercise of equitable jurisdiction to order deeds to be delivered up which, though void at law, may throw a cloud over a party's rights or involve him in litigation; and that the interference of Equity will be more especially proper when the legal invalidity of the instruments is not apparent on the face thereof; see, *ante*, note 1 to *Colman v. Sarrell*, 1 V. 50, the note to *Newman v. Milner*, 2 V. 483, and note 2 to *Toulmin v. Price*, 5 V. 235.

4. As to the principle upon which the value of an annuity is to be calculated, at any time subsequent to the purchase thereof, see note 2 to *Franks v. Cooper*, 4 V. 763.

SHAW, *Ex parte*.

IN THE MATTER OF GEORGE GRAVES, ESQ., A LUNATIC.

[1800, JUNE 20.]

AN annuity being void, the memorial not containing a clause of re-purchase, the grantee was not allowed in the account the premiums of insurance of the life of the grantor and costs incurred in supporting the annuity.

By indentures, dated the 19th of August, 1793, in consideration of 2800*l.* Graves granted to the petitioner an annuity of 400*l.* a-year for the life of the grantor, subject to a clause for re-purchase at the sum of 2900*l.* The annuity was charged upon the money to arise by the sale of the estates, and the stocks, in which [* 621] the money * should be laid out, the rents of the estates remaining unsold, and all other the real and personal estate of Graves; and it was provided, that if any of the funds so charged

an agent, trustee, heir at law, or executor, purchasing an incumbrance, shall as against a subsequent incumbrancer be allowed only what was actually paid.

The general rule laid down in *Williams v. Springfield*, 1 Vern. 476, is thus qualified, 2 Atk. 54, in *Morret v. Paske*.

(1) *Drummond v. The Duke of St. Albans*, *ante*, 433; *post*, as to the limitations of the accounts, and the note, 439.

(2) This decree was reversed on appeal to the Lord Chancellor, *post*, vol. vii. 3; Coop. 9. See the two preceding and two following cases.

should be laid out in the purchase of land by order of the Court of Chancery or otherwise, the lands purchased, or a sufficient part, should be charged with the payment of the annuity, and of all costs, charges, damages, and expenses, to be occasioned by the non-payment and recovery of the same or any part thereof; and in case the money to arise by the sale of the said estates should by order of the Court be directed to be paid to Graves, the same or a competent part thereof should be invested in stock, or laid out in lands in fee-simple; and the interest and dividends, rents and profits, should from time to time be applied in satisfaction of the annuity.

Upon the application of the petitioner several orders were made under this deed for payment to him of the dividends of the stock purchased with the money arising from the sale of part of the estates, and for the tenant of the estates remaining unsold to pay the rents to him.

In 1797 upon a motion by the petitioner for the purpose of obtaining farther payments, and a cross-motion, that the former orders might be set aside, and that the petitioner might be ordered to account for what he had received, on the ground, that the memorial did not contain the clause of re-purchase, the former orders were discharged; and it was ordered, that 284*l.* cash in Bank and the dividends to accrue upon the Bank Annuities, should be paid to Graves till farther order; and by an order made upon the 11th of August, 1797, the Master was directed to take an account of the debts owing by the lunatic.

The petitioner claimed before the Master as a creditor to a considerable amount, in respect of the purchase-money, with interest from the time it was advanced; accounting for what he had received in respect of the annuity. He also claimed several sums for insurance of the life of the lunatic, and interest upon those sums, and 92*l.* 1*s.* 3*d.*, for the costs and expenses incurred by him in respect of the said sum of 2800*l.*

* The Report stated the sum of 2200*l.* to be due to the [* 622] petitioner: but the Master having disallowed the claims in respect of the insurance and costs, the petitioner took Exceptions to the Report.

Mr. Mansfield and Mr. Stratford, in support of the Exceptions cited *Gwynne v. Heaton* (1) and *Heathcote v. Paignon* (2); where these allowances were made; though the annuities were set aside on the ground of imposition; observing, that this being a mere slip in the memorial, the case was much more favorable.

The Attorney General [Sir John Mitford] and Mr. Martin, for the Report. The money paid for insuring the life of the grantor was for an indemnity to the grantee himself. He could bring no such action. Such a claim is never permitted at law. The sums claimed by way of costs were, I suppose, incurred by his applications to the

(1) 1 Bro. C. C. 1.

(2) 2 Bro. C. C. 167.

Court, and by supporting his claim under an annuity, of which he admits he did not register a proper memorial, and which therefore he admits to be void. The Master could not possibly allow those costs. Generally speaking, the Court has not thought it prudent to allow such costs: sometimes it has been done, where a bill has been filed by creditors, and several have come in. The cases cited are quite different.

LORD CHANCELLOR [LOUGHBOROUGH]. There never was either in an action or in this Court an allowance of the premiums for insuring the life. The insurance is part of the speculation (1).

The Exceptions were over-ruled.

For the general doctrine as to the conditions upon which defective annuities are dealt with in Equity, see the notes to the three last preceding cases. Though, in the principal case, the Court would not allow a grantor of an annuity, who had become a lunatic, to be charged with the premiums paid for insuring his life, yet, in *Hoffman v. Cook*, (the case next to be noticed,) where the grantor applied to Equity to have his grant cancelled, upon formal objections to its validity, and offered to repay not only the consideration money, with legal interest, but also any other fair and reasonable demands, the Court held, that repayment of sums paid for the insurance of the grantor's life was only reasonable, as it was merely making whole the grantee, to whom nothing inequitable, throughout the transaction, was imputed.

[* 623]

HOFFMAN v. COOKE.

[ROLLS.—1800, DEC. 10, 22; 1801, JAN. 19.]

ANNUITY secured by bond and a trust of rents and dividends being void, the memorial omitting a clause of redemption, and the trust, and stating the consideration untrue, a general account was decreed of the purchase-money from the actual payment, which was subsequent to the date of the deeds, and of the premiums paid by the grantee for insuring the grantor's life, and an account of all sums received under the annuity; with interest respectively: on payment of the balance and the costs by the Plaintiff the securities to be delivered up; &c.: the bill offering to pay principal and interest and any other fair and reasonable demands. (a) A letter from the grantor, written prior to the grant, in the course of another negotiation between the parties, which did not take place, was admitted as evidence, but no farther than that he had upon that occasion proposed the insurance of his life as a reasonable term.

JOHN WALFORD executed a bond, dated the 28th of July 1790, under the penalty of 4000*l.* to secure an annuity of 252*l.* a-year, sold by him to Ann Cooke in consideration of 2000*l.*; and by indentures of the same date, reciting the agreement for the purchase of the annuity, it was witnessed, that in pursuance of the said agreement, and in consideration of the said 2000*l.* Walford assigned to

(1) *Hoffman v. Cooke*, the next case; where the premiums were allowed on the offer in the bill to allow any fair and reasonable demands: see the three preceding cases.

(a) See notes (a), and (b), to *Bromley v. Holland*, *ante*, 610, and cases there cited.

Ann Cooke, her executors, &c. for his life all the rents, issues and profits, of copyhold and leasehold premises, and the dividends and interests of trust funds ; to which estates and funds he was entitled for his life under his marriage settlement ; and it was agreed, that Ann Cooke should stand possessed of the said rents and dividends, in trust to permit Walford to receive the same until default in payment of the annuity ; and upon default to apply the same in satisfaction of the annuity. The deed contained the usual covenants and a clause of redemption ; and stated, that in order to secure the more regular and punctual payment of the annuity, Bridges was appointed receiver as to the copyhold and leasehold premises ; with powers of removal and appointment in the grantee and a provision for the indemnity of the receiver.

The annuity was paid regularly till 1794 ; when upon default judgment was entered up ; and Bridges, the Agent of Ann Cooke, got into possession and receipt of the rents and dividends of the trust estates and property. In 1797 a commission of bankruptcy issued against Walford ; and the bill was filed by his assignees to have the annuity set aside upon the following objections :

1st : The clause of redemption was not stated in the memorial :

2dly : At the time of executing the securities the sum of six guineas was demanded and taken by Bridges, the agent of the grantee, out of the consideration-money for twenty-three days' interest upon 2000*l.*, the time, that elapsed, while the annuity was negotiating. Besides that sum Bridges's bill of costs in this transaction, to the amount of 58*l.* 9*s.* 10*d.*, and another bill for other business done by him for Walford, viz. 26*l.* 11*s.* 8*d.* were taken out of the consideration-money :

3dly : * Though the deeds were dated the 28th July, [* 624] they were not executed till the 4th of August ; whence the grantee derived a farther benefit :

4thly : The deeds stated, that the consideration of 2000*l.* was paid to Walford by Ann Cooke ; whereas the consideration was paid by Bridges on behalf of Ann Cooke ; who was not present.

5thly : It appears by the memorial, that Bridges was a party to the annuity deed, but not, what his interest was, and for whom he was a trustee, or for what purpose he was made a party.

6thly : The memorial does not state, to whom the consideration was paid, otherwise than by setting forth the receipt indorsed upon the bond, with the addition, that the consideration was paid and advanced to or for the use of the said John Walford.

Upon these grounds the bill prayed, that the Defendants may transfer the trust fund of 7750*l.* 3*s.* 11*d.* Bank Annuities to the Accountant General ; and that the dividends and interest and the rents and profits of the copyhold premises and other trust property during the life of Walford may be paid to the Plaintiffs ; that the securities may be delivered up to be cancelled : the Plaintiffs offering to allow and pay to the Defendants what shall appear to be coming to them for the consideration and purchase-money paid for the

annuity, with interest, and any other fair and reasonable demands, after a deduction of what has been paid to and received by the Defendants.

The Defendant Walford, being examined for the Plaintiffs by order, deposed, that the sums stated by the bill, amounting in the whole to 91*l.* 7*s.* 6*d.*, were taken away by Bridges out of the whole sum of 2000*l.*, which was laid down on a table, before it was taken up by the deponent; and he only received 1908*l.* 12*s.* 6*d.* The deponent understanding from Bridges, that the purchaser of the annuity would necessarily insure his life, observed, that, in case he should redeem the annuity, the policy should be assigned to him; in which Bridges acquiesced: but there was no stipulation by the deponent, that the purchaser should insure.

The Defendant Bridges being also examined by order for the other Defendant stated, that the delay in concluding the [* 625] transaction * from the 5th of July, the day originally intended for the commencement of the annuity, to the 4th of August, was occasioned by Walford: objections being taken on his behalf to the appointment of a receiver as to more than the copyhold and leasehold estates, and upon some other points; and the sum of 2000*l.* was lying at a banker's from the 4th of July. The deponent farther stated, that at the granting of the annuity it was expressly agreed and understood, that the deponent, as agent for the Defendant Cooke, should insure the grantor's life. The several premiums paid upon that insurance amount to 846*l.* 10*s.* The sum of 2000*l.* was really and *bona fide* paid as the consideration, namely, 30*l.* cash and the residue in Bank notes to the best of the deponent's recollection and belief into the hands of Walford, and not placed upon a table only: but in case the same were placed upon a table, the same was paid in such manner that Walford had full power and dominion over the same, before he paid the money to the deponent for the bills of costs, &c. The bills were previously examined by Walford's brother, a solicitor.

The objections to the memorial in other respects were admitted; and it was not contended, that the annuity could be sustained. The principal question was as to the mode of taking the account: the Defendant Cooke insisting, that besides her principal, interest and costs, the several premiums paid for the insurance of Walford's life ought to be allowed with interest.

The Defendant Cooke produced a letter from Walford, dated in 1790, but written previously to the grant of the annuity, and in the course of a negotiation for another annuity between the same parties, which did not take place. By this letter Walford, speaking of the insurance of his life as one of the terms, proposed, that upon redeeming the annuity the policy should be assigned to him.

Mr. Piggott and Mr. Hall, for the Plaintiffs, objected to reading this letter in evidence; insisting, that the deed was conclusive against it; and at all events it could not be read before it was stamp-

ed ; whether produced only as evidence of a contract, or as a written instrument obligatory upon the party (1).

*Mr. *Richards*, Mr. *Romilly*, and Mr. *Bell*, for the De- [* 626]
fendants, Cooke and Bridges. This letter shows, that it is impossible for Walford to say, the insurance was not a reasonable term. The insurance was effected six days before the execution of the deed, immediately upon the receipt of that letter, and certainly upon the inducement of it.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This letter is not offered to vary the agreement ; but to show, what Walford thought reasonable terms for another annuity. It is not produced as evidence of any agreement entered into, and to have any binding effect, but to show, that he had offered to make another agreement different from that, which has been executed. If it was produced to prove, that the deed was made upon terms different from those expressed, it must be rejected. But the question now is, upon what reasonable terms, different from those, upon which the annuity was granted, the Court shall compel a redemption : not upon the terms of the deed ; for the bill is brought to set aside those terms, and to obtain others. The question then is, what are fair and reasonable terms. They say, they will show under Walford's hand, that he supposed they would insure his life ; and made an offer of a term, to be added to those, which this deed expresses. It is evidence merely of an offer, not accepted, if you will, under his own hand.

The letter was read.

For the Plaintiff. The terms, upon which annuities are set aside, are always upon an account taken each way ; and this bill makes that offer : but the Defendant claims to be allowed in the account the sums paid for the insurance of Walford's life, with interest upon those sums, to the amount of above 1000*l*. It is impossible to support the claim. There is no written agreement of any kind relative to this ; and the parol agreement rests upon the evidence of the person, who negotiated this transaction : Walford stating, that he merely said, looking forward to a redemption, that in that event, if the insurance should be made, the policy should be assigned to him. The Defendant Cooke was at perfect liberty to make the insurance. She wanted no agreement for that purpose. It was at her expense. An agreement with the grantor, that the grantee should insure, would be preposterous. But it * would be impossible [* 627]
to read any agreement, that is not to be found in the instruments ; unless it was kept out by fraud ; of which there is no pretence in this case. The general doctrine upon that is perfectly plain from the cases of *Lord Irnham v. Child* (2), and *Lord Portmore v. Morris* (3).

(1) Stat. 23 Geo. III. c. 58, s. 1.

(2) 1 Bro. C. C. 92.

(3) 2 Bro. C. C. 219.

Secondly, upon the positive right they are only entitled to legal interest. *Lawley v. Hooper* (1), which was long before the Annuity Act, is an instance of this allowance: but that was upon an express offer in the bill. This bill offers only any fair and reasonable demands they may have. In general, as Lord Hardwicke observes in that case, these transactions of annuities with clauses of redemption are only modes of lending money at an interest exceeding 5 per cent. By the insurance the Defendant put herself in a state of security.

For the Defendants Cooke and Bridges. The only objections to this transaction consist in formal defects in the memorial. It is not alleged, that there was any thing improper in the bills of costs paid out of the consideration. The question is as to the terms, upon which the Plaintiffs can have these securities delivered up. A right of redemption is reserved by the grant on paying the original purchase-money and the arrears of the annuity. That was considered reasonable in *Bromley v. Holland* (2); which case, though comprising circumstances, that do not occur here, is in principle very like this. The Defendant offers by her answer to give up the deeds upon being paid her principal, interest and costs, and the premiums paid for the insurance, and interest upon those sums. The Plaintiffs are bound by the offer in their bill to allow any fair and reasonable demands. What are the terms, upon which this ought to have been done? First, Walford agreed to the insurance. By that letter in 1790 Walford himself taking it for granted, that the insurance would be made, proposes, that upon redeeming the annuity the policy should be assigned to him. Secondly, if there was no agreement, it is reasonable; and the decisions are in favor of the Defendant.

In *Gwynne v. Heaton* (3) this question was discussed and determined. That was the grant of a rent-charge in reversion: [* 628] but * the principle is the same. The transaction was set aside, not upon a defect of form, but upon fraud. That might make a very important difference as to the terms. The party was entitled to no favor; yet Lord Thurlow held even in that, the strongest case, that the premiums paid for the insurance must be added, with interest; and though the transaction was set aside as dishonest, yet whatever money was fairly expended must be allowed. Upon a bill to be relieved against a usurious contract, though it is void at law, yet in this Court the party must pay what is really due. In *Heathcote v. Paignon* (4) also the premiums paid for insurance were given by the Master of the Rolls, with interest; and that decree was affirmed by Lord Thurlow on appeal. That was the case of an annuity; which was set aside on the vice of the transaction. That case, as it appears in the Register's Book (5), is much stronger than upon the Report. The decree made by Lord

(1) 3 Atk. 278.

(2) *Ante*, 610.

(3) 1 Bro. C. C. 1.

(4) 2 Bro. C. C. 167.

(5) Register's Book A. 1786, fol. 343.

Kenyon agrees with the Report; declaring, that the price paid being nearly two thirds below the real value and one fifth below the market price, the purchase had been obtained by taking advantage of the Plaintiff's distress; and therefore ought to be set aside. It appears, Lord Thurlow varied the decree by making the Plaintiff pay more on account of the insurance. Lord Kenyon had directed only the sums paid by John Paignon, the original grantee, on that account to be repaid with interest. Lord Thurlow following the principle gave in addition the premiums of insurance paid by the executrix of Paignon after his death. The variation is material; showing, that Lord Thurlow's attention was called to it.

In *Sawyer v. Bence* (1), upon an application to the Court of King's Bench to set aside the judgment upon objections to the memorial of an annuity, one of the objections to the memorial, and which the Court considered fatal, was, that it took no notice of an agreement indorsed upon the indenture, and made after the execution of it, for redemption upon payment of the principal and half a-year's interest. This was in the nature of a defeazance; and the Court thought, it ought to be enrolled; and they set it aside on payment of the principal and interest and the money paid for the insurance.

The principle therefore upon all these cases is, that [629] all, that has been *bona fide* paid, must be repaid with interest. It must be so in point of sense and reason. The purchase of the annuity is the purchase of an income for the life of the grantor. To make it of any value the life must be insured. It is for the benefit of both parties; for without the means of insuring no one would purchase an annuity without making the vendor pay it in the difference of the price. If the purchaser cannot go to an office, he must be his own insurer by varying the price. This is therefore a speculation, by which the grantor is benefited. This Defendant was dealing in a transaction which every one knows is insured. Can it be just, that she should be so considerable a loser by a redemption upon the terms now proposed? Why are not these reasonable terms? It is said the annuitant was put in a state of security. That is not so; for there are several contingencies, which are not covered by the insurance. But, taking it to be so, why should she not be put in a state of certainty? This is the case, not of a professed dealer in annuities, but of a widow, wishing to increase her income. The consequence of refusing the expense of insurance will be to throw these distressed persons into the hands of mere dealers in annuities.

With respect to the costs, the Plaintiffs coming for the assistance of the Court under such circumstances ought to pay the costs, in all events those subsequent to the answer; which offered to give up the annuity on payment of the principal, the premiums of insurance

(1) In the Court of King's Bench, Easter Term, 38 Geo. III. This case was cited from the note of the Attorney General, afterwards Lord Ellenborough. See 1 Suppl. to Vin. 246; Hunt on Annuities, 2d edit. 74.

and interest. All grounds for impeaching the transaction as improper are now abandoned. The retaining the six guineas was perfectly fair: the transaction not having been completed so soon as it ought; the money in the interval lying at a banker's: the delay being created on behalf of the grantor; who for that reason agreed to pay this small sum of interest. The bills of costs also are unimpeached. The ground therefore is mere form. The Act is so strict that the best advice has not been found equal to comply with all the terms of it. The nature of this bill is contrary to the usual course of Equity; the general province of which is to temper the strictness of the law.

Mr. Piggott, in reply. It is singular, that till this occasion the right to this allowance should have escaped all the Courts [* 630] of Justice * upon applications under this Act. Except *Sawyer v. Bence*, which probably turned upon the recommendation of the Judge, there is no instance either at law or in Equity, that this claim, if made, has succeeded. In *Gwynne v. Heaton* the Defendant was absolved from blame. The decree was founded upon the rule of policy, protecting expectant heirs. The Defendant was merely the acceptor of the offer of an expectant heir; who came into Court to set aside his own act against a party blameless; and no agreement to redeem appearing in either that case or *Heathcote v. Paignon*. Under those circumstances the Court certainly had power to say, upon what terms the redemption should be; considering it, not void, but voidable, upon reasons shown to the Court, turning it into a mortgage. If this sort of transaction is encouraged, particularly with an agreement for redemption, the consequence will be enabling people to lend money at more than 5 per cent., according to Lord Hardwicke's opinion in *Lawley v. Hooper*, that these transactions are entered into with that view. The annuitant certainly redeems herself from risk by the insurance. All the common and ordinary risks of life are included certainly. Suicide, death by the hands of justice, and death upon the seas, are the only contingencies excluded. The letter of Walford can have no influence. That agreement can have no effect between the parties. It imports no obligation upon them to do any act, of which he could have the benefit. The terms, upon which they contract, must be looked for in the instruments. It is a mistake to assimilate this case to *Gwynne v. Heaton*, and *Heathcote v. Paignon*. This bill desires the Court to declare instruments void, which the Act declares void to all intents and purposes. The Court only executes the law. The grantee cannot claim any benefit under this contract. The utmost she can desire is to have her money back again. That is the measure a Court of Equity will hold out in executing this law, by declaring these instruments void, giving back the money with interest, because the consideration failed.

The recent case before the Lord Chancellor, *Ex parte Shaw* (1)

cannot possibly be distinguished from this. In that case the Lord Chancellor determined, that in the account to be taken each way, as in *Byne v. Vivian* (1) and *Byne v. Potter* (2,) the premiums paid for the insurance should not be allowed. The act would be *defeated, if a Court of Equity deciding upon [*631] it goes farther than recompensing the party; and looks beyond the contract before it to another contract entered into by the grantee; into which she thought it prudent to enter, to secure herself against all the ordinary risks at least of life, to secure her principal with a much larger interest than the law allows; a contract, over which the grantor had no control. This is certainly a new case upon this Act; and will be a very general precedent, and very operative in its consequences.

The bills of costs are not disputed; but the six guineas for interest cannot be allowed.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. Certainly I shall allow interest only from the time the money was actually paid. It is not at all reasonable to allow that sum of six guineas.

Jan. 19th. The MASTER OF THE ROLLS (3). The only Equity of the bill is the want of some formalities required by the Annuity Act. This is a bill, calling upon a Court of Equity to exercise its jurisdiction, without any previous application to a Court of Law to set aside the bond and judgment; and the bill offers to pay to the Defendants what shall appear to be coming to them for the consideration paid for the annuity, with interest, and any other fair and reasonable demands, after a deduction of what has been received by the Defendants.

This offer is made three times in the bill; which ends with that offer; and therefore without entering into the question, whether in any case, when a bill is filed in this Court without any proceeding at law, the Court will enter into the consideration of the terms proposed by the Defendants, in this case I am clearly of opinion, that on the offer of the Plaintiffs, which they ought not now to be permitted to retract, they must make this allowance.

The terms are not impeached. The Defendant does not appear to be a dealer in annuities. There is nothing in the transaction that impeaches the conduct of the purchaser of this annuity. It was intended, that the annuity should bear date the 28th July; but the transaction did not take place till the 4th of August. The circumstances of the payment ought to have been stated in the memorial. The clause of redemption is also omitted; and the trust of the real estate, and the interest of Bridges. These are fatal objections under the Act: *but the transaction was not inequitable. [*632] The Plaintiffs however desire to have the deeds cancelled on reasonable terms; and the question is, what are reason-

(1) *Ante*, 604.

(2) *Ante*, 609.

(3) The judgment *ex relatione*.

able terms ; and I am glad to find, a Court of Law has done the same thing wherever it could. The insurance is not a complete indemnity : for there are many exceptions in the policy. There is nothing *malum in se* in the purchase of an annuity. The Defendant says, "I am ready to give up the annuity. Make me whole. Repay me all I have paid in respect of this annuity ; and that is all I ask."

The cases of *Gwynne v. Heaton* and *Heathcote v. Paignon* were upon bills to set aside annuities for fraud and imposition or undue advantage taken ; yet the Court thought, that, though the Defendants should not have the advantage of their contracts, they should only be set aside on receiving a complete return of all, that had been paid. In *Sawyer v. Bence*, Easter Term, 38 Geo. III., it is said, the Counsel consented to what was proposed by Lord Kenyon ; which gives the money paid for insurance. Here I consider the Plaintiffs as offering ; and the Court take them upon their offer. One of the Judges informs me, he believes, upon an action for money had and received in the account, the insurance money has been allowed ; and the Officer of the Court of King's Bench (Mr. Forster) to whom I have sent, tells me, in the account the money paid for insurance has been allowed again and again : but whether by the authority of the Court, or by consent, I am not accurately informed.

One case has been produced on the other side, to which I ought to pay the highest respect. It was an application to the Lord Chancellor in July last. In that case the grantor of the annuity was a lunatic ; and several orders had been made for payment of the annuity. An application being made by the grantee for farther payments, and another application to set aside those orders, they were discharged ; and the Master in taking the account refusing [*633] to allow the insurance money, exceptions were taken to * the report. The Lord Chancellor over-ruled the exceptions. The grantor did not make the application (1), or offer the terms ; as is the case here. The terms of paying the insurance are fair. The Plaintiffs must allow the insurance and pay the costs. The offer is to allow fair and reasonable demands. I think, these are fair and reasonable.

By the decree an account was directed of what was due from the Plaintiffs in respect of the principal sum of 1993*l.* 14*s.*, the consideration paid for the annuity of 252*l.* a-year, with interest at 5 per cent. from the 4th of August, 1790 ; an account of all sums of money actually paid for the insurance of the life of the Defendant Walford, and an account of all sums received by the Defendant Cooke on account of the annuity. It was directed, that the Master should make rests upon the payment of each sum paid for the insurance and also upon each sum paid to the Defendant Cooke on account of the annuity ; and compute interest upon every such payment at 5 per cent. ;

(1) There were cross applications in that case.

and the Plaintiffs paying to the Defendant Cooke what shall be found due upon the balance of the said accounts, it was ordered, that satisfaction should be entered upon the judgment, and the annuity and the policy of insurance be re-assigned. An account was directed of the rents and profits, dividends and interest, of the estates and funds received by Bridges; and a conveyance and assignment from him to new trustees.

SEE the notes to the four last preceding cases.

FEARON, *Ex parte*.

[1800, Nov. 10, 11.]

THE prerogative of granting a commission of review is to be exercised upon the peculiar circumstances and the importance of the case. In this instance, a sentence of the Court of Delegates setting aside a will, the report of the Lord Chancellor was against the application: his Lordship concurring upon the evidence, that the will was obtained, or an alteration prevented, by undue influence; and there being no question of law. Upon this proceeding no costs are given.

A PETITION being presented to his Majesty in Council to grant a commission of review of a sentence of the Court of Delegates (1) against a testamentary instrument as the last will of Edward Campion, deceased, was referred to the Lord Chancellor to report his opinion thereon (2).

* The will in question was as follows :

[* 634]

"I Edward Campion of Earl Street Blackfriars London do make and publish this my last will and testament in the manner following: *Imprimis*, I give and bequeath Elinor Campion of Waterford in the kingdom of Ireland the whole of my personal and real estate for and during her natural life and no longer; and after her decease I bequeath to Ann Garrick for the support of her and children five hundred pounds, and also to Sarah Bates five hundred pounds; and it is my will and intention, that Mr. Henry Fearon be my sole executor; and that this house, estates, furniture, &c. be sold and thrown into money for the purpose within mentioned. I desire, that my funeral expenses may not exceed fifty pounds. Finally I do hereby revoke all former wills. In witness whereof I the said Edward Campion set my hand and seal this 9th day of February 1789.

" EDWARD CAMPION.

EDWARD CAMPION, (*L.S.*)

(1) The Court of Delegates consisted of Sir William Henry Ashhurst, Sir Beaumont Hotham, Mr. Justice Heath, Sir James Marriot, Doctor Fisher, Doctor Lawrence, and Doctor Swabey.

(2) As to the mode of proceeding, see *ante*, vol. iv. 211. [See also *S. C.* 186, notes].

"Signed sealed and published by the said testator in the presence of us who at his request and in the presence of each other have subscribed our names as witnesses thereto

" J. WELBANK,
JA' LITTLE,
JA' BEEDHAM."

The testator died on the 28th of the same month of February. A *caveat* was entered in the Prerogative Court of Canterbury by Eleanor Campion, the sister and sole next of kin of the deceased. The grounds, upon which the will was impeached, were undue influence in obtaining it, and in preventing an alteration in favor of the natural daughter of the deceased, and the mental derangement of the deceased at the time of execution. The regular execution was proved by all the witnesses. Welbank was a surgeon, living nearly opposite to the deceased in the house of Farmer, an apothecary; and had attended the deceased for some time previous to his death; which was produced by a mortification in his leg. Little was an assistant to Farmer. Beedham was a hair-dresser, employed by Fearon in that capacity. Fearon was a surgeon; who drew the will; and was present at the execution. Ann Garrick, named in the [*635] will, whose real name was Carrick, * was house-keeper to the deceased. Sarah Bates was her niece; and also lived in the house.

Welbank's deposition stated, that after the execution of the will he remonstrated with the deceased; being uneasy at having signed a paper of such consequence with no other witness than a shopman and Fearon's hair-dresser; and desired to have his name marked off; upon which the deceased said: "It is their doing: that is only for a few days, in case any thing unexpected should happen, to prevent Holland and the young whore from coming in and turning the poor creatures out;" adding, that it should be then cancelled, and another made.

This witness stated, that there was some appearance of derangement in the deceased about the time of the execution.

O'Meara, a merchant, being examined on behalf of Fearon, stated, that on the 6th of February, 1789, the deceased declared to him, he had no kindred he knew of but his sister Eleanor Campion. He always expressed the highest friendship and greatest regard for Fearon. The deceased mentioned the contents of the will to the deponent, and the deponent asking what was to become of the residue, the deceased answered, "The executor is to have it, to be sure." Fearon and the deceased were acquainted about three years; and were very intimate during the last twelve months. The deceased would never dine with the deponent, unless he understood Fearon was to be there. The deceased told the deponent shortly before his death, that he

was reconciled to his daughter; but at the same time said, he would not leave her one shilling. He declared an intention of providing for his sister during her life; and that after her death Fearon should have the whole of his property.

William Hosier deposed, that upon the —— of February Fearon told him the captain's daughter had been with her father that day; and that her father told her to go home, and make herself easy; and he would do something for her; and Fearon solicited the deponent to go to the deceased, in order to make such alteration in his will. They went together and the deceased being told by Fearon, that he had brought the deponent to alter his will according to * his desire, he answered "Very well: I had some thought [* 636] of making an alteration in it, and leaving something to that girl: we will think about it. We cannot do it to-night: to-morrow, or some other time. There is no hurry." Fearon consulted the respondent as to the form and effect of the will.

Sarah Holland the natural daughter of the deceased, by her depositions stated, that she left her father's house about four years before his decease. Fearon came to live in the next house but one. The deceased was between seventy and eighty at the time of his death. Fearon had a considerable degree of undue influence over him. He frequently declared to the deponent, before she left him, that it was his intention to leave her all he was worth, except what he intended to leave his sister. He was not reconciled to the deponent till about a week before his death. Ann Carrick also had undue influence over him. Fearon attended him as a surgeon till his death. About a fortnight before the 24th of February the deponent went to the house of the deceased; and was refused admittance by Carrick on account of his low, dangerous situation. Upon the 24th she went there with Mrs. Farmer. The deceased was then confined to his bed; and by means of Mrs. Farmer, who took her up to his room, he was reconciled to her. She stayed with him till the evening and a great part of the next day. Being informed of the will by a friend, named Jameson, she mentioned it to the deceased; who said, it was only a little memorandum of two or three lines, in case he had been taken off suddenly; desiring her to make herself easy; for he meant to leave every thing to her. She went, and stayed with him by his desire the whole of the 26th. He received her in the most affectionate manner; and several times mentioned his intention to make an addition to the said memorandum in Fearon's possession, thereby to give all his property to her; desiring her to make herself easy, but not to mention it to any person in the house. Fearon drank tea there. After Carrick had taken away the tea-things she left the door ajar. The deceased desired Fearon to shut it; complaining that the people about him were listening and prying about. He then asked Fearon for the memorandum; saying, "I want to make this child's mind easy." No other person was in the room with them but Fearon; who saying, he had left it at home, the deceased added, "I desire you will write in addition to the

memorandum, that I make her my sole heir, and leave her every thing that I have in the world ;” and he desired Fearon to bring him the memorandum to sign, after the said addition was made ; which he begged might be done that night, and brought to him next morning. Fearon appeared confused ; and he hesitated a good deal ; upon which the deceased repeated what he had said ; asking Fearon if he understood him. Fearon then proposed to fetch Hosier for that purpose. The deceased assented ; saying, he did not care who did it, so it was done that night, and brought to him in the morning to sign ; charging them again with secrecy. Fearon seemed to acquiesce. Upon the 27th of February the deponent remonstrated with Fearon for not writing the addition to the memorandum. He said he had written it ; but it was not completed ; and he and Hosier waited the orders of Campion for that purpose. Mrs. Farmer also reproached Fearon. He kept out of the way all Saturday, till on account of the approach of the testator’s death it was too late. Fearon did propose to the deceased upon the 24th in the presence of the deponent to make a provision for her and her children. The deceased answered, he did intend it ; but desired not to be teased at that time.

William Holland, the husband of Sarah Holland, deposed, that upon the 26th of February, when his wife was with her father, the deponent stayed below ; and she came down with Fearon ; who in the presence of Carrick wished him joy ; saying something handsome was now going to be done. He confirmed his wife’s depositions, that Fearon at one time said, he had written the addition to the will ; but in answer to a question as to that at another time he said, he had not written the paper ; but, as he was sole executor, and knew the intention of the deceased to benefit the deponent’s children, it would be in his power to do so.

Mrs. Farmer stated, that the deceased was at first attended by Fearon only ; but during the latter part of his illness he was also attended by the deponent’s husband and Welbank ; and that he was frequently delirious for some time before his death. She confirmed the deposition of Sarah Holland as to the reconciliation, &c. Farmer, the apothecary, also deposed, that the deceased was delirious at times, and at other times sensible ; and that he was not apprehensive of being in danger. One of the witnesses also stated, that the deceased had an objection to have an attorney employed ; not liking form and ceremony.

[* 638] * The only point decided in the Prerogative Court was the preliminary question, whether parol evidence could be received to show, the deceased intended, Fearon should be only a nude executor ; and should not take the residue as such ; upon the allegation of Mrs. Cooke, the executrix of Mrs. Campion, deceased, of representations to the deceased Edward Campion by Fearon, that he should not take any beneficial interest by being named executor, and declarations of the deceased, that he so understood the law. From the judgment of Sir William Wynne upon that question, that

such evidence could not be received, Mrs. Cooke appealed to the Court of Delegates: who permitted the evidence to be taken *de bene esse*; leaving the point open to argument; and afterwards, when the cause was heard before them, pronounced a sentence setting aside the will; that the deceased died intestate; and that administration should be granted to Mrs. Cooke: but costs were not given.

Dr. Battine, [*The King's Advocate in the Admiralty*], in support of the petition. On the admission of the allegation in the Prerogative Court, Sir William Wynne was of opinion, that parol testimony was not admissible to show, what the testator's intention was in the appointment of executor in contradiction to the legal operation. The Court of Delegates considered it a new question; but said, they would give no opinion then, but consider the law, when they should try the fact. The will is sufficiently evinced. Besides that, there are declarations and recognitions of the deceased, admitted by the adverse party, that it was his will, but only wanted the addition of a codicil. Supposing that to be the case, can that evidence be admitted to set aside the will in direct opposition to the Statute of Frauds (1)? The Statute declares, that a written will shall not be revoked, altered or changed, by word of mouth, except the same shall in the life-time of the testator be reduced to writing, read to and allowed by him, and proved to be so done by three witnesses at least (2). Suppose actual fraud proved, with a view to prevent an addition to or alteration of the will, by no means admitting, that the attestation of the subscribing witnesses is not fully sufficient to establish it, or that the testator ever intended to make a codicil, yet the will cannot therefore be set aside consistently with the Statute. This is not a case of general incapacity, with lucid * intervals, but of general capacity with occasional delirium, proceeding from disorder. That is the result of the evidence; and that throws the proof upon the adverse party. [* 639]

The case of *Cole v. Mordaunt* (3) gave rise to the Statute of Frauds. The object of this clause is to prevent the effect of the gossiping of female relations and friends. The fraud imputed in this case is not as to the will, but in preventing a codicil from being made. I will put this case; a will, giving considerable legacies, and appointing an executor: the testator afterwards intending to give a legacy of 1000*l.* by codicil is prevented from executing that intention by the fraud of a person, to whom a legacy of 50*l.* is given by the will: can the will be set aside as to all the legatees, the appointment of an executor, &c. because that legatee of 50*l.* has been guilty of a fraud in preventing the execution of the codicil? If parol evidence of the fraud could be admitted, from what fund is the intended legacy of 1000*l.* to come: the person committing the fraud being a legatee of 50*l.* only? Is it to come out of the other

(1) 29 Char. II. c. 3.

(2) Sec. 22.

(3) Stated *ante*, vol. iv. 196, n. in *Mathews v. Warner*.

legacies? Whether any relief could be given in equity is not now the question: but it would be impossible to set aside the will consistently with the statute; which your Lordship would not be willing to impeach in any respect.

When this will was before the Delegates, the Advocate General proposed to expunge the clause appointing the executor, and let the rest stand; and in support of that cited *Barton v. Robins*; in which the testatrix was an old woman; who had nearly lost her sight: the attorney inserted a bequest of the residue to himself: she having got scent of this sent for him: but he avoided going to her; and she could never get the will from him. The Delegates under those circumstances struck out the disposition of the residue. She had declared in her life-time, that it was contrary to her intention. Three other cases cited were exactly of the same nature; *Parmenter v. More*, *Garnet v. Sellers*, and *Price v. Barnsley*: all cases of fraud; a residuary clause being surreptitiously inserted; and the Delegates in all of them held, that, where the clause is fraudulently inserted, evidence may be given for the purpose of striking it out. Another case of a different nature was cited: where evidence was admitted;

that such clause was inserted by mistake: *Bridge v. Arnold*. [*740] The surplus was given in trust: *and the scrivener by mistake introduced the words "for his own use." This was the error of the writer, not of the testator; and parol evidence was admitted to show the mistake. These are the only cases, in which the Spiritual Courts have taken upon themselves to expunge from a will any matter whatever.

But in this case there is no pretence for striking out one part of the will more than another. To do what was proposed the Court must add to the will instead of striking out; namely, by declaring the appointment of executor a bare and nude trust, and not passing any beneficial interest. There are only two cases, in which an addition has been made to a will: one upon the will of Doctor Gerard in 1789. He left a wife and a daughter. He had given directions to an attorney to make his will. A few months afterwards he wrote to the attorney to appoint another executor; and directing his wife's name to be inserted as residuary legatee. The attorney forgot her Christian name and therefore left a blank for her name; and the will being returned to the testator he did not fill up the blank; but her name appeared in the instructions. The omission being accounted for, the will, together with the instructions, was pronounced for as the last will of the deceased.

The other case was upon the will of a Mr. Janssen; containing a provision for his two daughters, and giving instructions to his attorney for giving the residue to one of them. That direction was at the top of the instructions. The attorney thought it better to put the residuary clause at the end; but, when he got to the end he forgot it; and the testator did not observe the omission. The Delegates established the appointment in favor of the daughter as residuary legatee.

An objection will probably be made from the time, since this sentence was pronounced; and perhaps it will be said, suits have been instituted in this Court in consequence of that decision: that would make no difference farther than a mere change in the name of the Defendant in those suits. But the real question is, whether a sentence ought not to be reviewed, that appears to operate against the Statute of Frauds.

* Mr. Parke, in support of the sentence.

[* 641]

This sort of application was new till your Lordship's judgment in *Matthews v. Warner* (1). Since that, there can be no doubt about the prerogative. Your Lordship stated, that after a grave inquiry before a respectable Court of Delegates a mere doubt would not be a sufficient ground for granting the application; and in reporting your opinion stated as the ground, that the points of law arising on the proceedings appear to be so important to the public, that it is fit they should be heard and determined in the most solemn manner. In this case there was a very long argument before the Delegates, but not a moment's hesitation or delay in the decision, setting aside this will. The cause was decided in May, 1797. Upon such an application it is for your Lordship's discretion to determine, considering the amount of the property, &c. I do not say, that if there was a serious question of law behind, that would not be a reason for granting this application.

As to the merits, the greatest part of what has been submitted to your Lordship never came in question. We applied upon totally different grounds. It was never contended, that the will was not formally executed. In many cases the formal execution has not been in question upon the issue "*devisavit vel non*?" *Bates v. Graves* (2) was cited before the Delegates. Your Lordship there says, "The issue, '*devisavit vel non*' always implies in it, where the execution is not the point of the issue, a question of the capacity of the testator; that is, either his absolute capacity or his relative capacity, where it is supposed, the particular instrument was the effect of that undue influence, which necessarily implies a degree of weakness at the time, and *quoad* that instrument, making it not an instrument arising from the fair bias of his own mind, but from the exercise of that improper influence."

We never intended to impeach the statute, or to say, that, generally speaking, a will duly executed could be revoked, except in the manner described by the statute: but under all the circumstances, considering the situation of this man, above eighty years of age, according to one witness, a sea-faring man, rough, ignorant, and illiterate, that he was in the power of the persons about him from the moment his unfortunate daughter quitted his house, not from *improper conduct, but living with her mother till [* 642] her marriage, which certainly was offensive to her father,

(1) *Ante*, vol. iv. 186. See the note, 211.

(2) *Ante*, vol. ii. 287.

that Fearon never knew the deceased till three months after she left his house, the influence appearing in O'Meara's evidence, that the only way of prevailing on the deceased to dine out was by asking Fearon, the surgeon attending him writing the will with his own hand, the circumstances, under which the will was obtained, it cannot be permitted to stand. We use the circumstance of Fearon making himself a nude executor with the other circumstances. How is it possible to suppose, this man could know, the executor would have the residue; though Fearon did not know it? By the force of his natural abilities, as Hosier represents it! It was a breach of confidence in Fearon, asking an opinion upon the effect of the will. Upon a minute attention to the evidence, the whole is a continuation of the same plan to deceive. It is singular, that Fearon coming to the house upon the day the reconciliation took place, should propose this, and that he should not propose it afterwards. The deceased was very uneasy, lest Mrs. Carrick or the other persons in the house should know any thing of his intention in favor of his daughter. No doubt, Fearon took the moment, when Mrs. Carrick was in the room, to make the proposal, with a view to defeat it, in direct contradiction to the deceased's wish. The moment the proposal was made by the deceased to make an addition to the will in favor of his daughter, Fearon insists upon having an attorney (1); though he knew the objection of the deceased to have one. It is positively sworn, that Fearon said, he had written the paper, but not completed it. Your Lordship asked, whether that could not have been exhibited. It is now said, they thought it better to rest upon the case, as it stood. But Holland, the husband, states, that Fearon said he had not written the paper; but, as he was sole executor, and knew the deceased's intention, it would be in his power to execute it. The executor, when taking probate, is obliged to swear, that is the only testamentary paper, that has come to his knowledge.

The whole result of the evidence is undue influence to a great degree. No attempt was made upon any side to dispute any question of law. We did not seek to overturn the statute by the introduction of parol evidence: but we put it upon the general ground [*643] *of circumvention, either in obtaining the will or in preventing the alteration. It was compared to the cases of fraud in this Court: *Taylor v. Rockford* (2), also the case of a surgeon; at whose conduct the Court expressed great indignation. It was compared to other cases in Swinburne; which, though long before the statute, were relied on at the bar, and quoted by the Judges. The Ecclesiastical Court are judges of fraud in cases of wills of personal estate. Swinburne in the Seventh Part lays down all the cases, in which wills may be avoided either from the beginning or by matter subsequent. Even in the summary of this chapter (3) he states it as a general proposition, that a will free from fault in the

(1) Hosier was not an attorney.

(2) 2 Ves. 281.

(3) Page 451, 5th edit.

original may afterwards become void in various ways. One case he puts is, where the party is in the government of another. This case therefore was foreseen by him. Some of the evidence is exactly according to the book in another part, speaking of prohibiting alteration ; showing practice used to prevent an intended alteration.

Doctor *Battine*, in reply. The *animus testandi* is certainly proved. The witnesses signed in consequence of something particularly pressed by the testator. It was not a mere mechanical execution. To the last moment of his existence he recognized this paper. It has been objected, that the will was drawn by a medical man attending the deceased professionally ; but there is no rule in law to impeach such will, as in the case of a guardian, before he has made up his accounts : there, or in the case of a person under duress, there is a general rule of policy, which forbids such conveyances to stand, though made with good faith.

In the case of *Coghlan v. Coghlan* a will signed by the testator, who had been insane, upon the application of his keeper was established by the Delegates ; but on some occasion Lord Thurlow said, that case was not law ; going farther than the general rule of policy, that such a person shall not be a witness or be present ; the will in that instance being signed upon the application of the keeper. Swinburne is speaking of a testament, which the deceased intends entirely to revoke, and he is prevented fraudulently from making another. In that instance the will is void. But if he does not mean to revoke the testament entirely, intending merely to make an addition or alteration, the whole will is not to be set aside *merely on account of an intention to make a codicil. [*644] *Taylor v. Rochford* does not apply to this case. That was a case of direct and positive fraud upon a poor sailor, conveying all his property for a very inadequate consideration. It is too much the way to argue, that a will regular according to the statute is to be set aside merely on suspicion of fraud. One great principle in the Testamentary Courts as to imperfect papers is, that, if the testator declares an intention as to property, and has time afterwards to put that in writing, and does not, the presumption is, that either he had not made up his mind, or that he had abandoned the intention. That rule operated in *Griffin's Case* (1). The decision of the Court of Delegates upon this will certainly could not have gone upon fraud ; for costs were not given ; which must have been the consequence.

With respect to the length of time, that has elapsed since the decision, at that time no commission of review had been granted for above a century ; and it was not thought advisable to make the application. As to the suits, that have been instituted, they were not instituted in consequence of intestacy ; but would have been instituted equally against Fearon as against Bainbridge. With respect to the amount of the property we are at issue ; and Fearon has exhib-

(1) Stated, *ante*, vol. iv. 197, in *Mathews v. Warner*.

ited an inventory to a considerable amount. In this case, by the course it has taken there has been in fact but one sentence; the cause being removed from the Prerogative Court before the final sentence.

LORD CHANCELLOR [LOUGHBOROUGH]. This petition is presented upon a suggestion, that the determination of the Court of Delegates turned upon a new and very important question of law; whether parol evidence could be admitted to show, that a testator did not mean, that the executor should take the residue by virtue of the appointment of executor; and on the other hand, that the testator was acquainted with the operation of law; which by intendment would vest the residue in the executor (a). The only way, in which that question could be stated, would be by an objection to the admissibility of the libel (1). That question therefore certainly has not occurred. Something of argument, that bears some affinity to it, arose in the discussion; and it was very ably argued.

[* 645] *I do not hold, that a petition for a Commission of

Review ought always to prevail; upon this plain and very obvious ground: a determination in the ordinary course of law has been obtained; and it is upon the peculiar circumstances and the importance of the case, that his Majesty should exercise his prerogative. It is true, here there has been but one judgment upon it. The judge in the first instance had not pronounced sentence. That is certainly a circumstance in favor of the petition; and if I could find in the best consideration I can give this case a question of law, particularly a question of so much importance, involving the consideration of the Statute of Frauds, I should pause in determining, whether upon the peculiar circumstances of the case, the length of time, and the conduct of the parties, there should not be farther consideration. But I cannot find any question of law here; and it appears to me to be merely the same case as an application for a new trial. It was put upon two grounds by the Counsel in support of the sentence; that the will was impeached, either as having been obtained by undue influence, or, as a separate and distinct consideration, that the deceased had an intention to alter the will; from executing which purpose he was prevented, being beset by the people about him; and farther they state a settled and precise alteration.

As to the second consideration, the conduct of the parties, which affords evidence as to the first, this executor had got the testator to put him in a condition by the will to benefit himself greatly, by appointing him a nude executor. It turns therefore upon the ques-

(a) As to the admissibility of this evidence, see 2 Williams, Executors, (2d Am. ed.) 1054, 1055; *White v. Williams*, 3 Ves. & Bea. 72; *S. C. Coop.* 58; *Langham v. Sanford*, 2 Meriv. 17.

In Massachusetts and some other States, the executor is in all cases trustee for the next of kin for the residue undisposed of. *Hays v. Jackson*, 6 Mass. 153. See also the remarks upon this point and the cases cited in 3 Phil. Ev. (Cowen and Hill's notes) 1495, 1496; *Fleming v. Bolling*, 3 Call, 75; *Hill v. Hill*, 2 Hayw. 298; 2 Story Eq. Jur. § 1208; *Bennet v. Batchelor*, ante, 1 V. 68, note (a).

(1) See Browne's View of the Ecclesiastical Law, vol. ii. 101, &c.

tion, whether there is evidence of such management and holding round the testator, after what is most distinctly in evidence, his intention to alter the will. That is no question of law; for, bound as the Court is by the Statute of Frauds, this Court has directed an issue to try, whether a will has been obtained by fraud; and there has been also this issue directed; whether the testator has been hindered by a person, and not a person claiming a direct benefit under the will, from altering it. That issue, I remember was tried at the assizes before Lord Chief Justice Eyre; though I do not recollect the circumstances of the case. Both these issues are perfectly consistent with the law and the full observance of the statute. It happens here, the evidence is given by deposition. It would *be more satisfactory, if it was by a *viva voce* examination. [* 646] The course of the Court does not admit of that. If I felt a doubt, whether I could to the full extent adopt the conclusion of the Court of Delegates, I am strongly inclined to think, I should not be warranted by that doubt to say, it is fit, a new trial should be granted by the operation of a Commission of Review. I have not examined the evidence with the same care the Delegates did: but, so far as I have examined the evidence, upon both points I concur with the Delegates, that the weight of evidence preponderates, that the will was obtained by dominion gained over his person. It is much stronger upon the second point; as to which the evidence confirms the first; that he, who gained that situation of benefit to himself by the will, hindered by a continuation of the same conduct that to be done, which the testator had directed him to do; which was the plainest of all things: namely, to declare a trust of the residue for a particular person. It goes farther; for there is the evidence of three witnesses, that he declared, he had executed the intention by making a writing. The situation of this testator is very different from that of Griffin in the case cited. That man had gone about the world about his affairs after writing that paper: this testator was bed-ridden. He did not fancy himself in the situation, in which he was. It is incident to that disorder to feel a considerable degree of hope, a warmth of mind. He had no communication, no constant and easy communication, except with the persons about him; always excepting that communication by Mrs. Farmer's forcing his daughter into his presence.

I shall report against the application, for this reason, that there is no question of law; but upon the evidence, upon the result I am far from being dissatisfied: but if I did feel a doubt, suppose, it was an application for a new trial before a Jury, I should send it to a new trial before the same tribunal (a).

Mr. Parke applied for costs; comparing it to the case of a motion for a new trial refused; upon which, he said, costs are always taxed of course in the Court of King's Bench.

(a) See *Mathews v. Warner*, ante, 4 V. 186, note (b); 2 Story Eq. Jur. § 1447, and notes.

Lord CHANCELLOR [LOUGHBOROUGH]. There have been so few applications of this sort, that I do not know where to [*647] find an instance. Besides *I have no cause before me. I have no officer to tax the costs. The application is not made to me: it is to his Majesty in Council; and by an order of Council it is referred to me.

No costs were given.

The Lord CHANCELLOR added, that this case affords a strong instance of the inconvenience of that determination of *Kerrich v. Bransby*, (1) that this Court cannot take cognizance of wills of personal estate as to matter of fraud; and that in this Court there could have been no difficulty: the executor would by his answer have confessed the trust as to the residue.

1. THAT the granting a commission of review, after a decision by the Court of Delegates, is discretionary, see, *ante*, note 1 to *Mathews v. Warner*, 4 V. 186.

2. As to the exception which the case of fraudulently setting up a will affords to the general jurisdiction of the Court of Chancery to relieve against all sorts of fraud, see note 1 to *Bates v. Graves*, 2 V. 287.

3. That parol evidence may be given to raise a presumption against an executor's *prima facie* title to a beneficial interest in the undisposed residue of his testator's property; as, on the other hand, the executor may adduce evidence to rebut that presumption; see note 3 to *Nourse v. Finch*, 1 V. 344.

4. With respect to the costs of proceedings under a commission of review, see, *post*, note 3 to *Ex parte Smith*, 5 V. 706.

ROAKE v. KIDD.

[1800, Nov. 12.]

A PURCHASER not compelled to take a doubtful title: (a) nor will a case be directed without his consent. The Court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life; there being no trustees to support them.

THE bill was filed for specific performance of an agreement for the sale of an estate to the Defendant. Exceptions were taken, founded upon objections to the title, involving several very doubtful ques-

(1) 3 Bro. C. C. 358; *James v. Greaves*, 2 P. Wms. 270; *Bennett v. Vade*, *Webb v. Claverden*, 2 Atk. 324, 424; *Anon.* 3 Atk. 17; *Bates v. Graves*, *ante*, vol. ii. 287; and the note, 293; *post*, vol. xiii. 297; 1 Fonb. Tr. Eq. 13, 68. This is the only instance, in which Courts of Equity disclaim a concurrent jurisdiction upon fraud.

(a) *Buller v. O'Hear*, 1 Desaus. 382; *Lewis v. Herndon*, 3 Litt. 358; *Kelly v. Bradford*, 3 Bibb, 317; *Seymour v. Delancey*, 1 Hopk. 436; *Young v. Lillard*, 1 Marsh. 482; *Morgan v. Morgan*, 2 Wheat. 290, 299; 2 Sugd. Vend. & Purch. (6th Am. ed.) p. 165, *et seq.*; *Pope v. Simpson*, *ante*, 145, and notes; *Cooper v. Denne*, *ante*, 1 V. 565, note (a); S. C. 4 Bro. C. C. (Am. ed. 1844) 88, note (a).

It is sufficient, however, if the vendor is able to make a good title at any time before decrees pronounced, although he had not a good title when the contract was made. *Hepburn v. Auld*, 5 Cranch, 262, 275; *Finley v. Lynch*, 3 Bibb, 366;

tions upon the point, whether the limitations after the estate for life of the Plaintiff were contingent remainders or executory devises : the Plaintiff contending, that they were contingent remainders ; and resting his title upon the destruction of those estates ; there being no estate in trustees to support the contingent remainders.

Mr. *Lloyd* and Mr. *Alexander*, for the Defendant, insisted, that a purchaser could not be compelled to take so doubtful a title. (1)

Mr. *Richards* and Mr. *Wear*, for the Plaintiff, observing, that this was a legal question, desired, that a case might be directed ; as in *Cheveley's Case*, lately.

*Lord CHANCELLOR [LOUGHBOROUGH]. In that case [*648] the party was not adverse. If in this case the purchaser was willing to have the opinion of a Court of Law, I would very willingly send it to law : but I do not know how to compel a purchaser to take a title he must go to law for immediately. I do not much like a tenant for life destroying contingent remainders, taking advantage of the want of trustees in the will, and then coming to this Court to give a sanction to that title. Has a case ever occurred, in which this Court has established such a title, and forced a purchaser to take it ?

The exceptions were allowed.

The Lord CHANCELLOR observed, that it had been intended to bring a bill into Parliament to prevent the necessity of trustees to preserve contingent remainders ; but that intention never was carried into effect.

As to the title which a purchaser may insist upon before he completes his contract, see, *ante*, the notes to *Cooper v. Denne*, 1 V. 565.

KNOLLYS v. ALCOCK.

[1800, Nov. 15, 17, 18.]

AGREEMENT for a partition established against a conveyance, and against a devise ; operating as a revocation by depriving the testatrix of all interest in the estate devised. (a)

Devise revoked by a contract for sale, (b) [p. 654.]

FRANCIS KNOLLYS and Lætitia Prankard, being seised as coparceners of estates in the counties of Berks, Lincoln and Oxford,

Seymour v. Delancey, 3 Cowen, 445 ; *Pierce v. Nichols*, 1 Paige, 244 ; *Cotum v. Ward*, 3 Monro, 304, 313 ; *Baldwin v. Salter*, 8 Paige, 473 ; *Dutch Church, &c. v. Mott*, 7 Paige, 78 ; *Poole v. Shergold*, 2 Bro. C. C. (Am. ed. 1844), 119, note (a) ; 2 Story Eq. Jur. § 777.

(1) *Marlow v. Smith*, 2 P. Wms. 198 ; *Shapland v. Smith*, 1 Bro. C. C. 75 ; *Cooper v. Denne*, *ante*, vol. i. 565, and the note, 567.

(a) See *Barton v. Croxall*, Taml. 164.

(b) *Tebbot v. Voules*, 6 Sim. 40 ; 4 Kent, (5th ed.) 528, 529 ; *Walton v. Walton*,

under a judgment in their favor in an ejectment brought by them as co-heirs at law of Sir Francis Knollys, Baronet, in November 1795 entered into the following agreement, signed by them both, and by the Reverend John King and the Reverend Thomas Martin, as witnesses :

" We, whose names are under written, do hereby agree to divide the estates, which we now enjoy as joint heirs of the late Sir Francis Knollys, Bart. in two equal and separate parts and shares : the Berkshire estate to be enjoyed solely by me Francis Knollys ; and the Lincolnshire estate by me Lætitia Prankard ; the difference in value, whatever it may be, to be made up out of the Oxfordshire estate ; and we do jointly agree to use measures to expedite the same, and to share the necessary expenses attending the same between us."

[* 649] * In the month of May preceding the execution of this agreement Mrs. Prankard had conveyed all her real estates in the counties of Lincoln and Oxford to Joseph Alcock, his heirs and assigns for ever. The consideration stated in that conveyance was divers sums of money laid out and expended by Alcock on account of Mrs. Prankard, services rendered to her, a release given by him to her, the esteem which she had for him, and 10s.

Mrs. Prankard died in April 1797 ; and by her will, dated the 9th of June 1795, reciting the conveyance to Alcock, she ratified and confirmed the said conveyance and assurance and the estates and premises therein mentioned to Joseph Alcock, his heirs and assigns for ever. She devised one full half of her undivided moiety of the Berkshire estate to the use of Doctor Martin, his heirs and assigns for ever ; and the other half part she devised to him and his heirs ; upon trust to receive the rents and profits for the use of himself and his wife and the survivor and the heirs of the survivor during the minority of John Martin Longmire ; and to the use of John Martin Longmire at the age of twenty-one for life ; with remainders in strict settlement to his sons and daughters, and other remainders over for the benefit of the Martin family ; and it was provided, that if Doctor Martin or his heirs should during the minority of Longmire think proper to enter into a deed of partition with Knollys, or to divide her said undivided moiety of the Berkshire estate from his moiety, or dispose of her moiety, it should be lawful for him to do so ; and in the event of a sale of her moiety she directed, that the

7 John. Ch. 258 ; *Brydges v. The Duchess of Chandos*, ante, 2 V. 417, note (b) and cases there collected ; *Ballard v. Carter*, 5 Pick. 112 ; *Mater v. Nan Mickle*, 14 Johns. 324 ; *Brain v. Brain*, 6 Madd. 221.

A deed obtained by fraud is not a revocation of a prior will. *Hawes v. Wyatt*, 3 Bro. C. C. 156.

But a deed given under circumstances, which render it void only in Equity and not at law, is a revocation. *Simpson v. Walker*, 5 Sim. 1.

A deed inoperative for want of completion, or incapacity in the grantee, may amount to a revocation, if it shows the intent of the testator to revoke. *Walton v. Walton*, 7 John. Ch. 269.

When part of the real estate devised is sold during life of testator, this is a revocation *pro tanto*. *Hawes v. Humphrey*, 9 Pick. 350.

produce should be laid out in other freehold estates, to be settled to the same uses. She gave Doctor Martin and Mrs. Stratton all the rest and residue of her estates and effects equally, share and share alike ; and she appointed them executor and executrix.

The bill was filed by Mr. Knollys, claiming under the agreement, and also as heir at law of Mrs. Prankard ; and the bill prayed, that the Defendants may be compelled specifically to perform the agreement ; that for that purpose the value of the Lincolnshire estate may be ascertained ; and if it shall appear, that the value of the Lincolnshire estate is more than that of the Berkshire estate, then that the difference may be made up out of the Oxfordshire estate according to the agreement ; that it may be declared, that the will, as far as it relates to the Berkshire estate, was revoked by *the agreement ; that a partition may be made of the [*650] Lincolnshire estate and the residue of the Oxfordshire estate, after setting apart so much as the Plaintiff or Alcock shall appear entitled to under the agreement ; and that one moiety of the said premises may be conveyed to the Plaintiff and his heirs : the other to Alcock and his heirs ; and that the Defendants may produce all deeds and writings ; and deliver up those relating solely to the Berkshire estate, and the other estates, to be conveyed to the Plaintiff in severalty.

The bill stated, that soon after the execution of the agreement the Plaintiff in pursuance of it caused a valuation of the Berkshire estate to be made ; and Mrs. Prankard refused to consent to a valuation of the other estates : but through the Defendants Alcock and Martin it was proposed, that the Plaintiff should keep the Berkshire estate, and Mrs. Prankard hold the other two ; which proposal the Plaintiff refused. The bill alleged, that the Plaintiff at the execution of the agreement had no notice of the conveyance to Alcock.

The Defendants Martin and his family insisted by their answers, that the will was not revoked by this agreement for an exchange, never executed ; and which the testatrix had no right to make ; Alcock not being a party to it.

The Defendant Alcock set up the conveyance to him in opposition to the agreement. His answer stated, that he and his brother John Alcock had discovered the right of the Plaintiff and Mrs. Prankard as co-heirs of Sir Francis Knollys ; that they had been at great trouble and expense in making out the title ; and admitted, that the conveyance was made as a compensation for that. He stated, that by a former will, executed in 1794, Mrs. Prankard had devised a moiety of her real estates in Berkshire, Lincolnshire, and Oxfordshire, to him : but being informed, that if he should die before her, that moiety would not after his death go among his wife and children, as she particularly wished, but would descend to his eldest son, therefore, and to enable him to make an arrangement for the benefit of his wife and children, she executed the conveyance ; and cancelled that will. The Defendant acted as owner after the conveyance ; taking possession of the

Lincolnshire and Oxfordshire estates and the title-deeds; and receiving the rents; and his name being substituted in the assessments to the taxes. The Defendant never heard of the agreement between Mrs. Prankard and the Plaintiff, till informed of it by Doctor Martin; and then declared, he would not consent to it; but offered the Plaintiff his choice of either the Berkshire estate alone or the Lincolnshire and Oxfordshire estates together; the value of the former being nearly equal to the two latter; and the Lincolnshire estate liable to damage; being on the sea-coast; and he offered to convey his share of those estates, on condition, that a moiety of the Berkshire estate should be conveyed to him; which was refused by the Plaintiff; who insisted on having the Oxfordshire estate in addition to the Berkshire, or an equal rental, without any consideration of the circumstances diminishing the value of the Lincolnshire estate. The Defendant advised Mrs. Prankard not to enter into any agreement with the Plaintiff, till he had made up his mind upon the proposal to take either the Berkshire estate only or the two others united. The Plaintiff had notice of the conveyance previously to the agreement; the Defendant having made applications to the Plaintiff to join him in necessary acts. The valuation of the Berkshire estate by the Plaintiff was only with a view to raising the rents.

The answer stating, that the title-deeds of the Berkshire estate remained with the Defendant's brother John Alcock, who was the solicitor employed in the ejectment, the bill was amended; and he was made a Defendant. The amended bill charged, that Mrs. Prankard had paid Joseph Alcock ample consideration for all his trouble and expense in making out the title; and that several sums were charged in John Alcock's bills of costs, as paid to his brother on that account; and that the Plaintiff and Mrs. Prankard each gave John Alcock 2000*l.* above his bill of costs for his and his brother's trouble; a considerable part of which sum he paid to Joseph Alcock.

The answers of the Alcocks to the amended bill denied, that they had received the two sums of 2000*l.* beyond the costs: but they admitted having received some small sums as presents. The answers were supported by the depositions of the Defendants Doctor Martin and John Alcock; and letters of Joseph Alcock were produced as evidence of his having acted as owner; and that the Plaintiff had notice.

[*652] *The *Attorney General*, [Sir John Mitford], *Solicitor General*, [Sir William Grant], and Mr. Hart, for the Plaintiff. With respect to the objection raised by Alcock against the execution of this agreement, as interfering with the previous conveyance to him, the only consideration he alleges is his services, and the expense he was put to on account of Mrs. Prankard; which were compensated to him and brother in another way: those services and that expense being made the subject of charge against the Plaintiff and Mrs. Prankard. He also states the conveyance to have been a substitution for an intended devise. It is impossible there-

fore to support it as a conveyance for valuable consideration ; and Alcock can claim nothing, except so far as the will operates: the deed, if it can be considered fit to stand, being merely a voluntary instrument ; and void therefore against the Plaintiff, as far as he is a purchaser ; though the Defendant may prevail against him as heir.

2dly, As to the claim of the Martins under the devise of the moiety of the Berkshire estate, how can it be argued, that by that will she deprived herself of the power of making the agreement as to that estate ? Of necessity the agreement revokes the will, so far as it is inconsistent with that will. The argument must go the length of contending, that the testatrix could not agree for a sale any more than for an exchange.

The Lord CHANCELLOR [LOUGHBOROUGH] stopped the argument ; declaring himself utterly at a loss to conceive, what case could be made against the bill.

Mr. *Piggott*, Mr. *Fonblanque*, and Mr. *W. Agar*, for the Defendants, the Alcocks. The first objection to this bill is, that the Plaintiff treated, knowing, there was a person behind, entitled, I may admit, by a voluntary conveyance ; for it is not necessary to contend, that it could be insisted on against creditors : this Plaintiff claiming, not in that character, but as heir at law. The agreement professes to treat as to the whole estate ; and was objected to as defective ; Alcock not having acceded to it. The Plaintiff lay by during the life of Mrs. Prankard ; and after her death comes to disappoint all claiming under her. The substitution of the conveyance for the devise is accounted for by her wish to put it in his power to provide for his family immediately. By the delay of this claim till after her death there is no opportunity *of substituting what [*653] she might have got from the Plaintiff. There is no agreement for an exchange. It appears, that Mrs. Prankard was perfectly satisfied with what she had done. Notwithstanding her advanced age there is no ground for saying, her intellects were weak. The evidence is all the other way. An insuperable objection to the execution of the agreement is, that a person having an interest was not made a party. Unquestionably, simply speaking, a partition is the right of the party : but why is the Court to go out of its course to give it in a particular form, and against this Defendant, claiming under this solemn act, confirmed by the will ; having taken possession ; with every mark of ownership ?

Mr. *Richards* and Mr. *Stanley*, for the Defendants the Martins. It is clear, Mrs. Prankard never intended to throw any imputation on this deed ; and if she did not disapprove it, no person claiming under her can. Her acts have disqualified her heir from disputing it. To make the agreement valid, Alcock was a necessary party. It is clear, she intended to give these devisees a benefit ; against whom the Plaintiff's claim, if successful, will have a very unfortunate effect. She intended to give to this family all her interest, except what passed to Alcock ; and the act done is only an equitable act, executory ; which neither revokes, nor was intended to revoke,

her will. This Court in executing agreements acts upon principles of sound discretion on equitable terms.

LORD CHANCELLOR [LOUGHBOROUGH]. I cannot conceive the doubt in this cause. This conveyance could not be set up against any person claiming under a transaction a Court of Equity or of Law would enforce; as a partition is. But, taking it to have been a conveyance for valuable consideration, that conveyance could not interfere with her act afterwards, agreeing with her co-parcener, that he should take specifically one part of the estate; that she should take another specific part; and that upon the whole there should be an equal partition between them according to the value. By her act, subsequent to the conveyance, entering into this agreement, with the privity and concurrence of Martin, one of the witnesses to that deed, she appears not to have considered herself disabled from contracting with respect to that estate: nor was she. The will establishes the conveyance: but, till the will took effect, she could contract, with respect to this estate, as she pleased. This was not in my conception such a conveyance as disabled her from [* 654] *entering into any contract as to the estate. Evidently the parties did not think so; for, though they disputed as to the execution of the agreement, they never contended, that she could not enter into an agreement. The will only gave what the deed gave; the moiety of a co-parcener of the Lincolnshire and Oxfordshire estates. She conveys according to her interest; and the will operates upon it. Her interest was an undivided moiety: she could not by her conveyance of the Lincolnshire and Oxfordshire estates destroy the right to an equality of partition, that the Plaintiff had. The Plaintiff had a right to a partition of the whole estate. The agreement, except fixing the choice for him of the Berkshire estate, and for her of the Lincolnshire estate, goes no farther than to make equal partition.

With respect to the Martins, this is a hard case; and if you can find any ground against the heir, because the intention of the testatrix has failed, I should be glad. I do not know, that the Plaintiff is heir at law. Suppose, another person to be heir, there can be no doubt, an agreement to make partition by allotting part of the estate is a revocation of a devise of that part of the estate (1). It would not bear an argument. If a writ of partition had been executed, and the whole Berkshire estate had been allotted to the Plaintiff, that would have revoked the will; and her agreement, that the whole of it should remain to him, as part of his moiety, has the same effect. So it is, where an estate is devised specifically; and is afterwards sold by the testator by a contract executory: the estate goes from the devisee.

The decree declared, that the agreement ought to be specifically

(1) *Rider v. Wager*, *Cotter v. Laver*, 2 P. Wms. 328, 622; *ante*, vol. ii. 436; *Vauceer v. Jeffrey*, *post*, xvi. 519.

performed: and directed an inquiry to ascertain the value of the estates in the counties of Berks, Lincoln, and Oxford; and, if the Berkshire estate is of less value than the Lincolnshire estate, that the Oxfordshire estate, or so much thereof as will be necessary to make the Berkshire estate equal with the Lincolnshire, shall be allotted to the Plaintiff; and for that purpose a Commission was directed to allot and set out the same. It was declared, that the devise to the *Defendants the Martins of the Berkshire estate was revoked by the agreement; and that they should join in conveying the same to the Plaintiff and his heirs. An account was directed of the rents and profits of the Berkshire estate, come to the hands of Thomas Martin: the balance to be paid to the Plaintiff; deducting the costs of the Martins: the Martins and the Alcocks to produce all deeds, &c.; and the Plaintiff's costs to be paid by Joseph Alcock (1). —

THAT a mere partition does not revoke a previous devise of the testator's interest in an undivided estate, see, *ante*, note 3 to *Brydges v. The Duchess of Chandos*, 2 Ves. 417; but, in the principal case, the testatrix, by her agreement, had left herself no interest whatever in one of the subjects of which she had previously made a specific devise; with respect to that subject, therefore, the agreement was, necessarily, a revocation.

TAIT v. LORD NORTHWICK.

[1800, Nov. 20.]

BIDDINGS opened by a person, who was present at the sale. (a)

MR. RAYNSFORD moved to open biddings upon an advance of 200*l.* on 2360*l.*; offering any farther advance that the Court should think proper; and stating, that the person, on whose behalf the motion was made, was prevented from bidding at the sale; having employed a surveyor to value the estate, whom upon going to the sale he found to his surprise attending, as agent, bidding for the purchaser.

The sale took place in September. Nothing more had been done than confirming the report *nisi* (2).

Mr. Stanley, for the Purchaser. The bill is filed by creditors by simple contract; who have been long kept out of their money. This

(1) This decree was affirmed upon a re-hearing, on the petition of the Defendant Martin, by Lord Eldon, C.; *post*, vol. vii. 558.

(a) As to the causes for opening biddings and the practice thereon, see *Chelham v. Grugeon*, *ante*, 86, note (a); *Anonymous*, *ante*, 1 V. 453, note (a), and cases cited.

(2) After the report absolutely confirmed biddings are not opened without special circumstances: *Walson v. Birch*, *ante*, vol. ii. 51. See the note, 55.

is not an insolvent estate: there is no deficiency. It is not a matter of course to open biddings merely upon offering a small advance. In *Somner v. Charlton* your Lordship refused to open the biddings on the ground, that the person, on whose behalf the motion was made, had attended the sale (1). These estates have been sold above their value.

LORD CHANCELLOR [LOUGHBOROUGH]. The estate is sold for payment of creditors. I cannot conclude, that there is no deficiency. It is a judicial sale, and for the purpose of distribution. It is not a matter of voluntary contract between the parties themselves. Then if the application is made in reasonable time, it is proper to open the biddings upon the usual terms (2).

As to the opening the biddings after a sale before the Master, and a report confirmed, see, *ante*, the note to the *Anonymous case*, 1 V. 453.

[* 656]

ANONYMOUS.

[1800, Nov. 22.]

AFTER an order for time to answer, the bill may be referred for scandal, but not for impertinence. (a)

IN August the Defendant had obtained an order upon the second application for three weeks' time to answer. Upon the 3d of November by a motion of course he obtained an order to refer the bill for scandal and impertinence.

Mr. *Lloyd*, for the Plaintiff, moved to discharge that order; observing, that the order obtained in August, by which the Defendant had got over the vacation, was to be peremptory; and insisting, that according to the case before Lord Hardwicke (3), the application was too late after a submission to answer.

Mr. *Scafe*, for the Defendant, said that according to Lord Hardwicke's opinion in that case the reference for scandal may be at any time; and observed, that the bill was very long, and the demand of very trifling value.

The Lord CHANCELLOR [LOUGHBOROUGH] seemed inclined to let the order stand: but the *Attorney General*, [Sir John Mitford],

(1) See *Rigby v. M'Namara*, *post*, vol. vi. 117; *M'Culloch v. Colbach*, 3 Madd. 314; *Thornhill v. Thornhill*, 2 Jac. & Walk. 347.

(2) The terms are making a reasonable deposit, and paying the purchaser all costs, charges and expenses, occasioned by his bidding.

(a) *Ayckbourn*, Ch. Pr. (Lond. ed. 1844) 197, 198; 1 *Smith Ch. Pr.* (Am. ed.) 569, 570; 2 *Madd. Ch. Pr.* (4th Am. ed.) 353, 354.

(3) *Anonymous*, 2 Ves. 631. Reference for impertinence waived by a subsequent reference for insufficiency. *Pellew v. —*, *post*, vol. vi. 456.

(*amicus curiæ*) saying, that after an order for time you cannot refer for impertinence (1), the order was confined to the scandal (2).

1. THOUGH a bill cannot be referred for impertinence after answer, or after praying time, which is a submission to answer, yet it was the opinion not only of Lord Rosslyn, in the principal case, but of Lord Hardwicke, in several cases, that a bill may be referred for scandal at any time; (but see note 6 *infra*.) The ground of the distinction seems to be, that the great objection to introducing irrelevant matter is the expense which it may cause to the opposite party; and if he will not complain of this in due time, he must bear it; but it is offering an indignity to the Court to make its records the vehicle of scandal, and that abuse the Court should for its own honor correct, at whatever time it is brought to its notice. *Fenhoulet v. Passavant*, 2 Ves. Sen. 24; *Anonymous case*, 2 Ves. Sen. 631. See, *post*, the note to *Coffin v. Cooper*, 6 V. 514.

2. A reference of the answer to an injunction bill, for impertinence, is good cause against dissolving the injunction: *Fisher v. Bayley*, 12 Ves. 18: but, in such case, the plaintiff is, according to the existing practice, usually put under the terms of procuring the Master's report at an early and fixed day. *Goodlage v. Woodhams*, 14 Ves. 537; *Joseph v. Willoughby*, 10 Price, 29. And upon the coming in of the Master's report, if that be favorable to the defendant, the injunction is, *ipso facto*, dissolved; (*Corson v. Stirling*, Coop. 94;) just as it is upon a report as to the sufficiency of an answer. *Vipan v. Mortlock*, 2 Meriv. 479. If the Master report a certain passage only of the answer to be impertinent, the remainder may still afford grounds enough for dissolving the injunction: *Raphael v. Birdwood*, 1 Swanst. 232: and it is not necessary to have the impertinent matter actually expunged before the defendant can move to have the injunction dissolved, though such motion could not be made pending the reference; (*Kenny v. Barnwell*, 2 Cox, 27; *Jennings v. Walker*, 1 Cox, 178;) for until the impertinence is expunged, (or rather, till its extent is reported, — for, as to its being expunged, it is the business of the plaintiff to see that done, *Raphael v. Birdwood*, *ubi supra*.) — it cannot be known what constitutes the answer. *Dyer v. Dyer*, 1 Meriv. 2. If an answer be first referred for impertinence, until the report on that head comes in no reference can be had for insufficiency. *Lacy v. Hornby*, 2 Vcs. & Bea. 293. And if a plaintiff, after referring a plea for impertinence, set down the plea for argument, this is a waiver of the reference for impertinence: indeed it has been intimated to be a general rule, any deviation from which would be likely to introduce inconsistency into the record, that a plaintiff who, after he has obtained a reference for impertinence, and before the report is made, takes any other proceeding in the cause, thereby waives his objection to the alleged impertinence. *Dixon v. Olmuis*, 1 Cox, 412. A plaintiff who thinks the answer to his bill is insufficient in some points, and at the same time irrelevant in others, must be cautious as to the order in which he takes those objections; he should first refer the answer for impertinence, since he cannot do this after he has obtained a reference for insufficiency. *Pellow v. —*, 6 Ves. 458.

3. The principal case limits the time within which a bill must be referred for impertinence; but as to the time for taking this objection to an answer, there is at present no established rule of the Court. *Kinworthy v. Allen*, 1 Brown, 400.

4. It should be observed, that by the bill now pending in Parliament "for the improvement of the administration of justice in the Court of Chancery," it is pro-

(1) See *Kinworthy v. Allen*, 1 Bro. C. C. 400, as to referring the answer for impertinence after notice of motion to dismiss.

(2) *Woodward v. Astley*, Bunb. 304. In *Lady Abergavenny v. Lady Abergavenny*, 2 P. Wms. 311, the order was refused as to scandal after answer; the Lord Chancellor professing to alter the practice in that respect. Reference for scandal may be upon the application of any one, whether a party, or not, and even without a motion. *Post*, *Coffin v. Cooper*, vol. vi. 514, but see the note; and upon any proceeding: In Bankruptcy, *Ex parte Simpson*, xv. 476; 3 Ves. & Bea. 93; *Ex parte Leigh*, Buck, 132: In Lunacy, *Ex parte Le Heup*, xviii. 221: on proceedings before the Master: *Erskine v. Garthshore*, *post*, vol. xviii. 114; *Price v. Shaw*, 2 Cox, 184. Costs as between attorney and client, *Ex parte Simpson*, xv. 476, and the note, 478.

posed that no order shall be made for referring any pleading, or other matter depending before the Court, for scandal or impertinence, until exceptions have been taken in writing, and signed by counsel, describing the particular parts thereof considered to be scandalous or impertinent, which exceptions shall be filed or delivered in the same manner as exceptions taken to an answer for insufficiency; and that when any answer shall be referred for insufficiency, or any answer or other pleading or matter depending before the Court shall be referred for scandal or impertinence, the party obtaining the order of reference shall procure the Master's report within a fortnight from the date of such order, unless the Master shall be of opinion that farther time was necessary for such reference, in which case he shall so certify by his report; and otherwise such order of reference, and the exceptions on which the same is founded, shall be considered as having been abandoned by the party obtaining such order; and farther, that when any scandalous or impertinent matter shall be expunged by the Master from the answer of any defendant and such answer shall be thereby rendered insufficient or defective, and the Master shall be of opinion that such defendant ought to be at liberty to put in a farther answer as to so much of the bill as the expunged passages related to, and the plaintiff shall not declare an intention of excepting to such answer for insufficiency, the Master shall, at the request of the defendant, certify such his opinion to the Court and fix the time to be allowed for putting in such farther answer. As, by the bill alluded to, it is also proposed that no exceptions to any answer shall be allowed to be filed after the expiration of two months from the filing of the answer, and as a reference for either scandal or impertinence is to be founded on exceptions, it follows that, if the act should pass without alteration in this respect, some of the doctrines stated in the preceding note to this case must be modified.

BAXTER v. DYER.

[1800, Nov. 24, 25.]

A DEVISE is not revoked by a mortgage in fee to the devisee. (a)
Whether a will was revoked by marriage and the birth of a child under particular circumstances, *quære*, (b) [p. 663.]

FRANCES HERRIES was seised in fee of the manor and estates of Westhope in the county of Salop, subject to a term of 500 years, vested in Lord and Lady Kinnaird for securing the sum of 5336*l.* 6*s.* 8*d.* and interest, and also to another term for 300 years. The term of 500 years was originally created upon a mortgage for 8000*l.* to Griffin Ransom: which was assigned upon the 19th of April, 1797, to Lord and Lady Kinnaird.

(a) See *Walton v. Walton*, 7 John. Ch. 269; *Hedges v. Green*, 4 Russ. 28; *Livingston v. Livingston*, 3 John. Ch. 155.

A testator after making his will mortgaged the estate in fee with a proviso in case of repayment to re-convey to testator, or to such person, or for such estate, and to such lawful trustees, &c. as the testator by deed, &c. should appoint; such conveyance operates as a revocation of the will *pro tanto* only. *Brain v. Brain*, 6 Madd. 221. See *ante*, *Knollys v. Alcock*, 648, note; *Ballard v. Carter*, 5 Pick. 112; *Brydges v. Duchess of Chandos*, *ante*, 2 V. 417, note (b); 4 Kent (5th ed.) 528, 531.

(b) See on this point, *Gibbons v. Caunt*, *ante*, 4 V. 840, note (a); *Hodsdon v. Lloyd*, 2 Bro. C. C. (Am. ed. 1844), 540, note (d) and cases cited; 4 Kent, (5th ed.) 521-527; *Jacks v. Henderson*, 1 Desaus. 543; *Church v. Crocker*, 3 Mass. 17, 21; *Coates v. Hughes*, 3 Binn. 498; 1 Williams, Executors, (2d Amer. ed.) 106, *et seq.*

Frances Herries, being so seised, and the mortgage having become absolute at law, by her will, dated the 4th of October, 1790, gave, devised and bequeathed, all her estates, both real and personal, and of what nature or kind soever, and wheresoever, unto and to the use of Sir John Swinnerton Dyer, his heirs, executors, administrators and assigns, subject to the payment of her debts, and also to some annuities and legacies; and she appointed Sir John Dyer her sole executor.

In June, 1791, the testatrix sold a small part of the real estate; and with the money produced by the sale she reduced the mortgage to 4000*l*. By indentures of lease and release, dated the 23d and 24th of June, 1791, in consideration of 4000*l*. paid to Lord and Lady Kinnaird by Sir John Dyer at the request of Frances Herries she conveyed the said estates to the use of Sir John Dyer, his heirs and assigns for ever, by way of mortgage, for securing, and subject to redemption upon payment by Frances Herries, her heirs, executors, administrators or assigns, unto Sir John Dyer, his executors, administrators or assigns, of the sum of 4000*l*. with interest; and the remainder of the term of 500 years was by the said indenture assigned by Lord and Lady Kinnaird to Thomas Dyer in trust for Sir John Dyer and to attend the inheritance; and the remainder of the term of 300 years was also assigned to a trustee for Sir John Dyer upon the same trusts.

The testatrix died in November 1792. Sir John Dyer entered; and levied a fine. The bill was filed by a nephew of the testatrix, and co-heir at law with her niece Ann James; who released her claim to Sir John Dyer. The prayer of the bill was, that it may be declared, that the indentures of June, 1791, are a revocation of the will; and that the Plaintiff is entitled to redeem one moiety of the estates.

Mr. *Mansfield*, Mr. *Alexander*, and Mr. *Hart*, for the Plaintiff. A mortgage in fee, though a revocation of the devise at law, certainly has not that effect in this Court, where made to a stranger; being considered as a pledge only, not an absolute conveyance. But where the mortgage is made to the devisee himself, the contrary is established; and an inconsistent estate being given immediately by the operation of the deed, it is a necessary revocation.

*The very point was decided by Lord Macclesfield in [*658] *Harkness v. Bayley* (1), a much weaker case, upon a mortgage for years; which circumstance is the only difference. That authority is recognized in all the Equity books, that have followed. *Cooke v. Bullock* (2), which is referred to in that case, is very strong. The Court will not extend the exception to the rule farther than they are compelled by the authorities. A person can no more be a mortgagee than a lessee of his own estate. In *Lord Lincoln's Case*, (3) the Court had a strong inclination against the

(1) Pre. Ch. 514.

(2) Cro. Jam. 49.

(3) 1 Eq. Ca. Ab. 411; Show, P. C. 154.

revocation: but it prevailed; and that has always been considered as law. The fine, that has been levied, is no objection; the Defendant being no more than a mortgagee.

The *Solicitor General*, [Sir *William Grant*], Mr. *Romilly*, and Mr. *Wooddeson*, for the Defendant. The Plaintiff declines any discussion of the general principle, upon which it has been held, that in general a mortgage is no revocation of a devise; and rests upon the authority of a single case; by which it is contended the Court is bound. It is necessary, or at least useful, to go into the general principle. There are two sorts of revocation known in the law: one by an alteration of the estate the devisor had; which operates altogether independent of his actual intention, and may sometimes in direct opposition to his known intention: the other proceeds upon actual intention, appearing by acts directly inconsistent with the will. It is undoubtedly true at law, that if any alteration has taken place in the estate the devisor had at the time of executing the will, it cannot pass. It is equally true, that a mortgage in fee at law creates a total alteration of the estate. It is an alienation to all intents and purposes after the forfeiture. The doctrine upon that subject cannot be stated better than it is stated by your Lordship (1) in the judgment in *Brydges v. The Duchess of Chandos*, treating of the exceptions to the general rule. As far as respects mere alteration of the estate, it is precisely the same, whether the mortgage is made to the devisee or to another person. It cannot therefore rest upon that distinction; for the estate passes away equally at law.

The question then is, whether there is a greater indication of intention in the one case than the other. What is there in any degree inconsistent in these two things: an intention of the [*659] testatrix, that after her death Sir John Dyer shall take the estate absolutely for his own use, and her borrowing from him a sum of money, for which she has present occasion, giving him a pledge upon that estate; which was her's, and was to continue her's during the whole of her life: a pledge available in her life-time; even though she should have altered the devise? Could she not make use of her estate for that purpose? They must show something, that precludes her intention to make him her devisee: proving, that with that intention she could not borrow money from him on that security. Why not from him as well as any other person?

With respect to the authorities themselves, if there is any point, that can be looked upon as clearly settled at this day, it is, that a mortgage is not in this Court a revocation of a devise, generally; which is clearly established by a variety of cases. The object of this bill is to let in a new distinction; an exception out of an exception. The law, instead of resting upon a general principle, will be done away by nice and subtle distinctions. The Court will require a precise authority upon good grounds. *Harkness v. Bayley*

(1) *Ante*, vol. ii. 428. See the note, 437

professes to rest upon another case : which is no authority for it ; the decision is in three lines, and by whom it was pronounced does not appear. If *Coke v. Bullock* were to be decided at this day, perhaps the ground, upon which it stands, would not be considered valid : but the ground is expressly declared to be, that the lease for years is to begin at the death, the same moment with the will ; not upon the general proposition, that a lease to a devisee is a revocation, but upon evidence of actual intention. In *Hodgkinson v. Whood* (1) the same distinction is recognized. In *Coke v. Bullock* it is laid down, that "if it had been made unto her to begin presently or futurely in his life-time, that had not been any revocation ; for it might have determined in his life-time, and have well stood with his will." Even at law a mortgage for years is not a general revocation. In this case it is not of necessity, that the mortgage should co-exist with the devise ; for it might have been paid off in the life of the testatrix. The circumstances of *Harkness v. Bayley*, if any other comment upon it is necessary, are different ; and it may be said, that in this respect it is brought somewhat *within *Coke v. Bullock* ; that it might have [* 660] been contended, that the mortgage was necessarily to begin after the mother's death. This case differs from *Harkness v. Bayley* in this ; that this mortgage was a subsisting mortgage, when the will was made ; and was afterwards transferred. Stripped of the artificial reasoning, nothing can more strongly show the intention, that the estate should continue his. The case of *Harkness v. Bayley* has received no confirmation since. In *Villiers v. Villiers* (2) the proposition it contains is denied by Lord Hardwicke ; who states the distinction between that case and *Coke v. Bullock* ; that in the latter the term was not to commence till after the death of the testator. There is no inconsistency in the supposition of two fees in the same person ; of which there are many instances ; as the legal and equitable fees, the fees *ex parte paterna et materna*, &c.

Mr. *Mansfield* in reply. It is impossible to reason upon the doctrine of revocation in any of the cases ; in which such a conveyance has been held a revocation, though the uses were not altered, and there was nothing denoting an intention to revoke, contrary to reason and common sense. Without doubt a mortgage is a revocation at law : but Courts of Equity perceiving the absurdity took hold of the case of a mortgage : but that was quite arbitrary, founded upon the strong disposition to get rid of the monstrous absurdity, that had been the consequence of those decisions. Then came *Harkness v. Bayley*. Certainly it is not exactly similar in circumstances. There is nothing in the objection, that the mortgage was not necessarily redeemable till the death of the mother ; for the revocation must be immediately upon the conveyance ; the operation of which could not be effected by that provision. The question depended upon the

(1) Cro. Ch. 23.

(2) 2 Atk. 71.

not therein before mentioned and devised, unto his said wife ; in trust to sell and dispose of his estate at Yeovil and Weston Zoyland, and also other real or personal estate he was possessed of or entitled to under the will of George Evered, at such times and in such manner as she should think proper ; and to divide the moneys arising from such sales, together with all other moneys as might be due to him upon securities or otherwise, unto and among all and every his younger children, sons and daughters, in equal shares and proportions ; and to be paid to them respectively at such time or times as his said wife in her judgment and discretion should think proper ; and he appointed her sole executrix.

By codicil, dated the 9th of June 1796, reciting, that by his will he had given and bequeathed all his real and personal estate and effects, except his capital messuage at Samerton and house at Bridgewater, to and among all his younger children share and share alike, the testator declared, that, as he did advance and give his two eldest daughters Jane and Elizabeth at their respective marriages the sum of 500*l.* a-piece, he revoked any claim they might have upon his said effects after the decease of his wife ; and he gave them only an equal share of the *residuum* of his effects, after all their younger brothers and sisters should have been paid 500*l.* a-piece ; as they were at their marriages ; and farther reciting, that he had advanced his daughter Susanna at her marriage the like sum of 500*l.*, he revoked any claim she might have upon his said effects after the decease of his wife ; stating, that he did give her the sum of 500*l.* in lieu of any claim or demand she might have upon his said effects ; and for which he gave a security at her said marriage.

[* 666] * A farther testamentary paper, dated the 1st of September 1797, began as follows :

“ Directions and the plain meaning of my will, and which I hope will be adhered to without any disputes among my children : namely, that my wife shall receive the rents and profits of all my estates together with all interest of moneys in the funds or other securities during her life. If an opportunity offers of marrying any of her children would advise her to advance 500*l.* towards their portions the same as I gave my other daughters upon their respective marriages.”

This paper contained some farther directions. The testator died in March 1798 ; leaving several children besides those, who were married. The testator's widow, having taken Probate of all these testamentary papers, applied at the Bank for liberty to sell out the said two sums of Bank Annuities, without assigning any reason. The Bank refused to comply with this application, as she had only the interest for life, and on account of the ulterior trust for the younger children. The widow brought an action against the Bank ; upon which the bill was filed ; praying an injunction ; and charging, that the Plaintiffs were bound to, and did at the requisition of the Defendant, the widow of the testator, enter so much of the will as relates to the Annuities in the proper Offices ; and are thereby

chargeable with the interest of the younger children ; that the ancient practice of the Bank, where a partial interest or for life only in any stock has been devised with the ulterior interest, is not to permit a transfer of such stock during the life of the person entitled for life without the direction of a Court of Equity ; especially, where such stock has not been devised to special trustees in trust for the equitable trusts and limitations, and with special powers to sell out, transfer and exchange.

The testator's widow by her answer stated, that she desired to transfer the stock into her own name ; that previously to her application she caused the registry of the Probate to be made in compliance with the practice of the Bank. She did not assign any particular reason for her request, except upon one application ; when it was stated on her behalf, that 100*l.*, part of the 650*l.* 5 per cent. Annuities was purchased by the testator out of the trust * money under the will of John Evered, given to Susanna [*667] Philpot, to be paid at the age of twenty-one or marriage ; and that it would become payable in December next. The Defendant submitted, that the refusal was not warranted ; as she is sole executrix ; and as there is no specific gift of the stock ; and as the testamentary paper mentions the testator's money in the funds in general terms ; and that paper is not attested by any witness ; and she insists, she has an absolute right and power to sell and transfer ; and is alone answerable for the application.

Mr. *Mansfield*, Mr. *Piggott*, and Mr. *Wooddeson*, in support of the motion for the Injunction. The Defendant does not state, that she wants this stock for debts. The Bank protects the fund for those entitled after the death of the Defendant ; who are all of age except one. Though there has been an executor, also entitled to the stock for life, the Bank have never permitted him to make a transfer on account of his legal title, to dispose of it to the prejudice of the persons entitled afterwards. They do permit the executor to transfer to a specific legatee of the stock, but not to any other person, nor to himself. The Act of Parliament (1) directs the Bank to enter the clause of the will in their books ; and the circumstance of two witnesses to the will is not attended to. The last testamentary paper alone relates to this. One consequence of transferring into the name of the Defendant would be, that it would go to her representative : who might not be his. The only reason assigned is, that 100*l.*, part of the stock, is the property of one of the children ; who will be of age in a month. That may be a reason for transferring so much to that person, but is no reason for transferring that, much less the whole, to the executrix herself or to any other person. Many families have been saved from ruin by the interposition of the Bank. One of these children is an infant ; and three are married women. They consent : but your Lordship will not attend to their consent upon this application.

(1) Stat. 1 Geo. I. stat. 2, c. 19, s. 9, 12.

and other estates of Sir George Wynne, to be sold, and that the said manor and hereditaments comprised in the mortgage were sold to Richard Hill Waring for 30,500*l.*; and other premises for 2000*l.* more; and farther reciting, that by a subsequent order, made in 1769, taking notice that Mr. Waring had paid 12,500*l.*; and Sir Robert Cunliffe was willing to advance the remaining 20,000*l.* upon mortgage of the premises, it was ordered, that upon payment by Sir Robert Cunliffe into the Bank of that sum in discharge of the purchase-money, Waring should be let into possession; which was done accordingly; and stating, that 17,852*l.* 12*s.* 9*d.*, reported due to Arabella Trevor upon her mortgage, was paid to her upon her executing an assignment; it was witnessed, that in consideration of 20,000*l.* so paid by Sir Robert Cunliffe and the 12,500*l.* paid by Waring, the several parties did by the appointment of Waring and his wife convey the premises to Sir Robert Cunliffe, his heirs and assigns, subject to redemption by Waring, his heirs, executors or administrators, on payment of the said 20,000*l.* with interest on the 15th of October 1771. The deed contained the usual covenant on the part of Mr. Waring for payment by him, his heirs, executors, or administrators, of the mortgage-money and interest; and he also executed a bond of the same date.

By indentures of lease and release, dated the 14th and 15th of February, 1786, on assignment of that mortgage the premises were conveyed to Sir John Hadley D'Oyley and John Scott Waring, their heirs and assigns for ever, subject to a proviso or covenant on the part of Richard Hill Waring for redemption on payment of the 20,000*l.* and interest; and he also executed a bond on that occasion.

By indentures of lease and release, dated the 15th of August, 1791, upon a farther advance of 10,000*l.* by Sir John [*671]. *Hadley D'Oyley and John Scott Waring to Richard Hill Waring he granted, released, and confirmed, to them, their heirs and assigns, the said premises, freed and discharged from the proviso for redemption in the indentures of 1786, but subject to a proviso and covenant on the part of Richard Hill Waring for payment by him, his heirs, executors or administrators, of the said sum of 30,000*l.* with interest. He also executed a bond of the same date in the penalty of 60,000*l.* for payment of the said 30,000*l.* agreeably to the covenant.

Richard Hill Waring by his will, dated the 16th of January, 1779, after giving two annuities, and reciting, that since his marriage he had purchased to him and his heirs the manor of Ince, but to enable him to do so had mortgaged the same and other lands and premises, devised all his estate and interest therein, subject to the said annuities, and such other annuities, bequests and directions, as by his said will or any codicil he might give, expressly charging his said estate of Ince therewith, to his wife for life without impeachment of waste; and after her death to such uses and purposes as she being sole and unmarried should by will or otherwise, as therein mentioned, ap-

point, subject, as aforesaid : so as such appointment should not take effect, till such parts of his lands in Shrewsbury as were in mortgage to Mary Owen should be discharged therefrom ; and in default of such appointment then to his own right heirs, subject as aforesaid ; and farther reciting, that before his marriage with his then wife she had conveyed all or a considerable part of her messuages, lands, &c. in the county of Flint to trustees upon trust, that they should, so soon as the testator should require, by mortgage thereof raise 3000*l.*, to be applied in the first place to pay off the principal and interest of a mortgage of 1850*l.* upon his estate at Oswestry, such mortgage to be thereupon assigned in trust to attend the inheritance of the premises therein comprised for the benefit of the person, to whom the same was by the same indentures limited, the residue of which 3000*l.* was to be paid to the testator, his executors, administrators and assigns, he thereby directed, unless as thereafter provided, that the trustees should as soon as convenient, raise such 3000*l.* and therewith discharge the mortgage, and pay to his wife the residue of the said 3000*l.* ; which he gave to her, together with all the rest of his personal estate ; upon trust to discharge all his debts, for which at the time of his decease he should not have given real securities, and all such bequests and annuities (not including those before mentioned) as he should therein or *by codicil give, and [*672] with which he should not expressly charge his estate in Ince ; and to keep the residue of the said 3000*l.* and of all other his personal estate to her own use : provided, that if she should by any other means discharge the said mortgage and his said debts, and should pay all such bequests and annuities, (not including those before granted,) the said 3000*l.* need not be raised as aforesaid.

By indentures of lease and release, dated the 13th and 14th of March, 1797, declaring, that the sum of 30,000*l.* was the money, not of Sir John D'Oyley and John Scott Waring, but of Mrs. Hastings, they by her direction assigned 20,000*l.* to Charles Imhoff, son of Mrs. Hastings, and two thirds of the premises comprised in the indentures of 1791 subject to redemption ; and by lease and release, dated the 11th and 12th of May, 1797, the remaining interest in the mortgage, as to 10,000*l.*, was assigned to Sir John D'Oyley and other persons.

The testator's wife Margaret, the daughter and heir at law of Sir George Wynne, died in the testator's life ; and he married again. He died upon the 20th of October, 1798 ; leaving John Scott Waring, his heir at law. The testator's widow took out administration with the will annexed ; and she married — Ward. The bill was filed by the heir at law ; charging, that the mortgage was not the old burthen upon the estate, when the testator purchased ; but that he mortgaged the same in manner aforesaid ; and he personally borrowed 30,000*l.* ; and pledged the estate as a collateral security for repayment ; and did not purchase the said estate or any part thereof subject to such debt ; and praying, that the real estate might be exonerated.

The Defendant Ward and his wife by their answer claimed the personal estate.

Mr. Lloyd, Mr. Richards, and Mr. Short, for the Plaintiff. In this sort of question, between an heir at law and the administrator, it is very important to see, what was the understanding of the party himself. The result of the transaction is, that Mr. Waring purchased all the interest in the estate; borrowing 20,000*l.* for that purpose; and was to give a mortgage for it. How is it possible to consider this as only a purchase of the equity of redemption? He afterwards borrows the farther sum of 10,000*l.* on this estate. [* 673] He clearly considered this his own estate subject to the mortgage. The recital in his will shows it plainly; that he had purchased this estate to him and his heirs; but to enable him to do so had mortgaged the same. The expression "subject as aforesaid" applies only to the annuities; clearly not to the mortgage. The will affords no inference of an exemption of the personal estate in favor of the next of kin. The recitals of the conveyance and the order are to the same effect. That mortgage to Sir Robert Cunliffe is clearly an incumbrance imposed by the testator himself; and if so, the personal estate is first liable; unless there is something in the will making an alteration. Perhaps he might have intended his personal estate to go to his wife discharged from the incumbrances: but by her death in his life that bequest lapsed. The personal estate therefore is not disposed of by the will; and must be applicable to this debt imposed by the testator himself. There was no idea of leaving any mortgage existing upon the estate; which under the decree was to be sold-out and out; and the money to be paid into Court; and under that decree Mr. Waring was reported to be the purchaser of those estates. It was obviously a purchase of the whole inheritance, not of an equity of redemption; and out of the purchase-money the former mortgages were paid off. In all the subsequent transactions there are new provisos for redemption, and bonds given by him; which is a material ingredient in all these cases. Though there is no covenant or bond to pay the money every mortgage implies a loan and every loan implies a debt; and therefore the personal estate is liable (1).

Mr. Sutton and Mr. Steele, for the Defendants. First, the effect of the will is expressly to charge the real estate, and exempt the personal estate: but if the Court is against the Defendants upon that, secondly, the sum of 17,852*l.* 12*s.* 9*d.* was the old incumbrance on the estate at the time of the testator's purchase; and therefore the personal estate is not applicable to that.

Upon this will there is no doubt, that, if the testator's wife had survived him a single day, the personal estate would have been exempted. In none of the cases, in which personal estate in the hands of the next of kin in consequence of a lapse has

(1) *King v. King*, 3 P. Wms. 358; 5 Bac. Abr. edition by Mr. Gwillim, tit. Mortgage, 23; *Cope v. Cope*, 2 Salk. 449; 1 Eq. Ca. Ab. 269, pl. 2; *Meynell v. Howard*, Pre. Ch. 61. See *Floyer v. Lavington*, 1 P. Wms. 268.

been held not exempt, has there been such an express purpose of exemption as in this will, and a trust for all the debts except such as are charged upon his real estate. Upon that the intention is express, that the heir at law shall not have this benefit against the next of kin.

Secondly, as to so much of the debt as was upon the estate at the time of Waring's purchase; and which has merely changed hands by being assigned to Sir Robert Cunliffe, strengthened only by Waring's covenant, that never was his debt. As to that, the Trevors requiring their money, Sir Robert Cunliffe was only assignee of the old mortgagee, and Waring only the purchaser of the equity of redemption; and then the question is, whether he intended to convert so much of his personal estate as includes the amount of the mortgage and the equity of redemption into real. When the money was paid can make no difference. *Bagot v. Oughton* (1) has never been disputed. In all those cases of a transfer of a mortgage the mortgagee lends his money upon a better security than the owner of the equity of redemption can give him, upon a paramount old mortgage; and the covenant of the owner of the equity of redemption can only be to strengthen the security. The question is not, whether the personal estate is benefited; though it is impossible to say, that the effect of paying off the Trevors with Sir Robert Cunliffe's money has had the effect of a benefit to Waring's personal estate. The mortgage was transferred to Sir Robert Cunliffe; and the equity of redemption only conveyed to Waring; without doubt he was declared the purchaser of the whole estate: but he paid only part of the purchase-money; and the remainder advanced by Sir Robert Cunliffe, was not lent to Waring upon his credit, but on the credit of the estate; and the greater part was applied in paying off the old mortgage. That money being paid into Court by order, the Court would never have parted with it without notice to Sir Robert Cunliffe till the conveyance. The transaction was imperfect; a treaty for a purchase of the estate; and it ended in Sir Robert Cunliffe's getting a transfer of the old mortgage, and Waring getting the equity of redemption. In *Tweddell v. Tweddell* (2), as in this case, the party in point of form agrees to pay the whole purchase-money, but in fact pays no more than was necessary to make up the whole *sum; and yet he was [*675] held only a purchaser of the equity of redemption: and therefore not to be exonerated by the personal estate; and there is a variety of authority (3), that the circumstance of a covenant or bond for the money will not vary the case; if it amounts only to a purchase of the equity of redemption; being considered to be only for the convenience of the transfer: the charge remaining substan-

(1) 1 P. Wms. 347.

(2) 2 Bro. C. C. 101, 152.

(3) See Mr. Cox's note to *Evelyn v. Evelyn*, 2 P. Wms. 659; *ante*, *Hamilton v. Worley*, vol. ii. 62; *Woods v. Hunkingford*, iii. 128; *Butler v. Butler*, *ante*, 534; and the note, I, 187.

tially the same. Where the transaction shows, the real estate is the primary fund, the personal estate shall be only auxiliary; though the party has made himself personally liable. This testator knowing, he was by law liable to this, might speak of it as his mortgage. I admit, his saying, that his heir should take subject to the mortgage, would not do alone: but in this will the particular intention appears by express direction as to what charges he intended to lay upon his personal estate. If his wife had lived, there could have been no doubt; and his next of kin are substituted in this respect. Intending to marry again he might think, his will would do.

Mr. *Lloyd*, in reply, was stopped by the Court.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. The only question before me now is upon the will; whether the personal estate is discharged from the testator's debts secured by mortgage. I have a pretty strong opinion upon the other point (1), that has been argued: but it would be improper to decide that, till it is ascertained, whether the personal estate is sufficient for those charges, to which under the circumstances it is clearly liable.

With respect to the question now to be determined, I have no difficulty in declaring, that it is impossible upon this will to raise any presumption, that the testator meant to exempt the personal estate in favor of this Defendant from those debts, which, if there is no exemption, will be a charge upon it. I could refer to many cases, and one before Lord Thurlow, that is quite analogous, in which this has been determined: but upon principle, without referring to the authorities, nothing is more clear, than that if there is any gift in favor of a particular legatee, and he dies, no benefit that legatee could have claimed, if he had survived, can be set up against the persons, to whom the estate would come subject to the disposition in favor of that legatee, if he had lived. If for instance [* 676] an estate * had been given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts, to which he would be liable, if no such provision had been made; and is not a general exemption of the personal estate. The case of *Pickering v. Lord Stamford* (2) is very analogous in principle. My first decree was against the right of the widow; considering her barred in all events: but I changed my opinion upon a rehearing; and the decree, as then varied, was affirmed upon appeal by the Lord Chancellor. Nothing is more clear than that where an exemption is created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises.

The testator has never expressly charged the personal estate with these debts. He gives the estate he had purchased, charged with annuities and such other annuities, bequests, and directions, as he

(1) Decided by Lord Eldon, *post*, vol. vii. 332, that the real estate was exonerated by the personal.

(2) *Ante*, vol. ii. 272, 581; iii. 332, 492.

might afterwards give, to his wife for life, with a power of appointment. He afterwards gives her the personal estate, not in words of exemption, but with words of charge, that are upon fair inference equivalent to words of exemption, from debts, for which he should at the time of his decease have given real securities. I admit therefore, the first Mrs. Waring would have taken the personal estate discharged from those debts. The clear effect in point of law is a gift to her of the personal estate with the benefit of this exemption; and there is no inference, upon which any one else can claim the benefit of it. Upon the true construction of this will therefore this discharge of the personal estate could operate only in favor of the first wife; and unfortunately the testator not having republished his will, or made any other disposition, it is the same as if he had never made any disposition as to the effect of the securities, to which his real estate was liable; and it must be admitted under the circumstances, that there is a charge, with respect to which the heir at law has a right to an account.

Declare, that the bequest of the residue of the personal estate to the testator's wife became lapsed by her death in his life. Direct an account of the debts, and how they are secured, and of the personal estate; and reserve the consideration, whether the Plaintiff is entitled to have the estate descended to him exonerated from the money due by mortgage to Mrs. Trevor at the date of the indentures of the 27th and 28th of February, 1771.

1. THE case before Lord Thurlow, alluded to by Lord Alvanley (in the principal case) as one authority amongst many that if a legacy lapse, by the death of the legatee before the testator, no collateral benefit attached to that legacy, which benefit was intended in favor of the individual legatee, can be claimed by the party upon whom the lapsed interest devolves, is, perhaps, *Hale v. Cox*, 3 Brown, 324: and see, *ante*, note 4 to *Pickering v. Lord Stamford*, 2 V. 272.

2. That the personal assets of a deceased party are not to be applied in discharge of an incumbrance upon his real estates, which debt he neither originally contracted nor subsequently took upon himself, see note 3 to *Hamilton v. Worley*, 2 V. 62.

ISHERWOOD v. PAYNE.

[* 677]

[ROLLS.—1800, DEC. 2.]

THE testator having given his wife the option to occupy his house at a certain rent, and if she should choose to do so, declared, she should have the use of the furniture, by codicil, revoking the bequest of an annuity to her, gave her a legacy, to provide furniture in case she should not choose to occupy his house or for any other purpose she should think proper. She occupied the house and furniture till her death; and her executor was held entitled to the legacy.

THE testator by his will gave to his wife 400*l.* a-year for her life or during widowhood, in addition to what she was entitled to by his settlement; and he directed, that it should be in her option so

long as she should continue his widow, until his present, or in case of his death his next eldest son, should arrive at the age of twenty-one years, to occupy his mansion-house, land and premises, at Old Windsor; paying a yearly rent of 100*l.* only for the same. He also declared, that if she should choose to occupy the house and premises at Old Windsor during his eldest son's minority upon the terms before mentioned, she should have the use of all the goods and furniture therein and belonging thereto without paying any farther rent or consideration for the same.

By a *codicil* the testator revoked the annuity of 400*l.* a-year given to his wife; stating the circumstance, that he had then five children; and he gave her 500*l.* to provide furniture in case she should not choose to occupy his house at Old Windsor or for any other purpose she should think proper.

After the death of the testator his widow occupied the house and furniture till her death; which took place about a year after that of her husband.

Upon the bill of the children against the executors the only question arose upon the claim of the legacy of 500*l.* by the executor of the widow.

Mr. *Romilly* and Mr. *Owen* for the Plaintiffs said it was clear, the widow was not entitled to that legacy.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN], was clearly of opinion, that she was entitled to that legacy: the fair construction being, that if she should not want it for furniture, she should have it for any other purpose; and the Court refused to make any declaration upon it in the decree; though pressed by the Counsel under an apprehension, that the question would be raised before the Master.

No rule is better established than that which declares the propriety of giving effect to every word of a will, when no part thereof is plainly inconsistent with the testator's general intent; (see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194;) but, in the present case, there was very far from being any clear indication of an intent that the renunciation by the testator's widow of the occupation of his house should be a condition precedent to the vesting of her legacy; and without a forced construction of that kind it would have been impossible to limit the absolute terms of the bequest.

CAMPBELL v. WALKER.

[ROLLS.—1800, DEC. 3.]

THERE is no rule, that a trustee to sell cannot be the purchaser: but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time, to have a re-sale; (a) unless the trustee, to prevent that, purchases under an application to the Court. (b)

EDWARD HALL by his will gave all his freehold, copyhold and leasehold, estates, and all his personal estate, with some exceptions, to have and to hold unto John Walker and William Clarke, their heirs, executors, and administrators, upon trust, as soon as conveniently may be after his decease to sell for the best prices, that can reasonably be had; to the intent that all his estate and effects may be turned into money, as soon as conveniently may be after his decease; and for the facilitating and corroborating any sale or sales, that may be made, the testator declared, the receipt of his said trustees should be a discharge to the purchasers. He then gave particular directions for selling his estates in lots, in case his said trustees and executors shall not see cause to the contrary: the Link Farm to be one lot; the Quarry Brewhouse another. Then after several legacies the testator gave all the residue among the Plaintiffs at their ages of twenty-one.

The trustees in execution of the will proceeded to sell the prem-

(a) In all cases, where a purchase has been made by a trustee, on his own account, of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not. 1 Story, Eq. Jur. § 322. See *Davoue v. Fanning*, 2 Johns. Ch. 252, where the subject is thoroughly sifted, and the cases examined; *Rogers v. Rogers*, 1 Hopkins, 515; *Van Horn v. Fonda*, 5 Johns. Ch. 388; 2 Kames, Prin. Eq. 87; *Saltmarsh v. Beene*, 4 Porter, 283; *Litchfield v. Cudworth*, 15 Pick. 23 31; *Copeland v. Merc. Ins. Co.* 6 Pick. 198; *Grider v. Payne*, 9 Dana, 190; *Richardson v. Jones*, 3 Gill & Johns. 163; *Haddix v. Haddix*, 5 Litt. 202; *Davis v. Simpson*, 5 Harr. & John. 147; *Brackenridge v. Holland*, 2 Black. 377; *Arnold v. Brown*, 24 Pick. 96; *De Caters v. Le Roy De Chamont*, 3 Paige, 178; 1 Madd. Ch. Pr. (4th Am. ed.) 111, 112; Fonbl. Eq. b. 2, ch. 7, § 7, note (r); 4 Kent, (5th ed.) 438, and cases in the notes; *Perry v. Dixon*, 4 Desaus. Eq. 504, note; *Butler v. Haskell*, ib. 654; *Davis v. Simpson*, 5 Har. & John. 147; *Boyd v. Hawkins*, 2 Bad. & Dev. Eq. 207; *Wade v. Pettibone*, 11 Ohio, 57; *Mills v. Goodsell*, 5 Conn. 475.

The purchase is not absolutely void; it is voidable only at the election of the *cestui que trust*. *Prevost v. Gratz*, 1 Peters, C. C. 368; *Harrington v. Brown*, 5 Pick. 519; *Denn v. M'Knight*, 6 Halst. 585. See *Wilson v. Troup*, 2 Cowen, 196; *S. C.* 7 Johns. Ch. 25; *Jackson v. Woolsey*, 11 John. 446; *Denn v. Wright*, 2 Halst. 175. Such sale is capable of confirmation. *Prevost v. Gratz, ubi supra*; *Jackson v. Woolsey, ubi supra*; *Gallatin v. Cunningham*, 8 Cowen, 361.

The *cestui que trust* must pursue his remedy within a reasonable time. *Hasley v. Cramer*, 4 Cowen, 718; *Prevost v. Gratz, ubi supra*. See farther, on this subject, Fonbl. Eq. b. i. ch. 2, § 12, note (k); b. ii. ch. 7, note (r); Eden, on Injunctions, (2d Am. ed.) 30, 31, in notes; 3 Sugden, Vend. & Purch. (6th Am. ed.) 150, [226] *et seq.*, and Hammond's notes; *For v. Mackreth*, 2 Bro. C. C. 400, 401, and cases cited in Mr. Belt's note; *Hayward v. Ellis*, 13 Pick. 276; *Ball v. Carew*, 13 Pick. 28; *Whicote v. Lawrence*, ante, 3 V. 740, note (a) and cases cited.

(b) See 3 Sugden, Vend. & Purch. (6th Am. ed.) 159, 160, [239], 151, [227], in note.

ises; putting up the Link Farm and afterwards the Quarry Brewhouse in separate lots and at different times. The Link Farm was purchased by John Clarke in trust for William Clarke, the trustee, for 1450*l.*, being 10*l.* more than he was directed to bid: but William Clarke agreed to take it. At a subsequent auction John Clarke purchased the Quarry Brewhouse in trust for John Walker and William Clarke for 6310*l.*

The bill was filed on behalf of the residuary legatees, still under age; praying, that the sales might be set aside, and the premises resold. Upon the evidence the sales were perfectly fair and open. It was declared immediately afterwards, who were the purchasers. The premises were duly advertised; and several bidders were present at the sales. It was also in evidence, that the trustees endeavored to persuade the tenant of the Quarry Brewhouse to purchase it. At a previous sale the trustees had bought that lot for 6040*l.*; but they had it put up again; determining to pay that sum, if it should not produce more.

[* 679] *Mr. Lloyd and Mr. Steele, for the Plaintiffs cited *Whelpdale v. Cookson* (1), *Fox v. Mackreth* (2), *Crowe v. Ballard* (3), and *Whichcote v. Lawrence* (4); relying particularly upon the Lord Chancellor's doctrine in the last case.

Mr. Richards and Mr. Hubbersty, for the Defendants. It is not now disputed, that the trustee may be the purchaser. The trustee may possibly give a great deal more than the value, *pretium affectionis*. The Court would not order a release, if it should plainly appear to be for the benefit of the *Cestuy que trust*, that it should not be resold. The rule therefore is not universal: but the Court will require the trustee to show, that it is not for the benefit of the *Cestuy que trust*, that there should be a resale. *Whichcote v. Lawrence* is a very particular case. The Plaintiffs there produced positive evidence of fraud; and there is no case of this sort, in which the allegations of the bill have not been sustained by evidence. In this case no evidence is produced by the Plaintiffs; and the *bona fides*, with which the Defendants have acted, is clearly made out by them. The Court will look at the transaction with great jealousy; and the principle is certainly of great importance to the public: but upon the principles laid down by the Lord Chancellor in that case, if it is made out, that the trustees have given the utmost, that can be got, they are not within the rule. This is a case of that sort. Every thing has been done, that could be done, for the advantage of the estate; and the trustees have given more than any other person would give. The trustees employed a person to bid for them, merely to avoid the inconvenience of deterring other persons from

(1) 1 Ves. 9, stated from the Register's Book at the end of this case.

(2) 2 Bro. C. C. 400.

(3) 3 Bro. C. C. 120; *ante*, vol. i. 215.

(4) *Ante*, vol. iii. 740, and the note, 752; *Ex parte Reynolds*, *post*, 707. As to contracts between attorney and client, see *Newman v. Payne*, *ante*, ii. 199, and the note, 204.

bidding against them. The will gives special directions to sell; and the testator himself marks out the lots. It was very material to sell in that way. If this purchase is not established under these circumstances, trustees will feel it extremely dangerous to act in any degree.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I take the result of the evidence in this cause to be, that this was a fair *bona fide* sale, liable to be impeached only from the circumstance, that the purchasers were the *trustees; [*680] and then it is a very important question. It is said for the Defendants, there is no case of this kind without evidence to impeach the sale in itself. Whether that is so, or not, the question is, whether there is any principle for such a bill as this, filed on behalf of infants, calling upon the trustees under a will to permit a resale of premises, of which they became purchasers; alleging, that the premises were not sold at the utmost value; and that more might have been got. That they allege; but have not proved; for they have produced no evidence. The defendants admit, they were trustees and purchasers, but at a fair, open sale; and they say, they gave as much as the premises appeared to be worth, and as much as any one else would give; and no fraud, mismanagement, or negligence, appears before the Court. Still the Plaintiffs insist, that according to the principle, which has prevailed in these cases, the *Cestuy que trust* has a right to put an end to this sale; and I am of opinion, the rule of the Court does go to that extent. It is not necessary for the Plaintiffs to oppose the case of *Whichcote v. Laurence*. According to the principle adopted by the Lord Chancellor in that case no trustee shall ever be permitted to gain an advantage by selling to himself: if he had resold, and got any thing by the resale, he should not have the benefit of that. What is the benefit of retaining the premises? If it is for the benefit of the infants, that they should be resold, the difference is equally gained by the trustee. The Lord Chancellor's doctrine in that case certainly applies to a sale of premises, of which the trustee is still in possession. The question will always be, whether the *Cestuy que trust* have lain by; or whether there has been any ratification. I will lay down the rule as broad as this; and I wish trustees to understand it; that any trustee purchasing the trust property is liable to have the purchase set aside, if in any reasonable time the *Cestuy que trust* chooses to say, he is not satisfied with it. The trustee purchases, subject to that equity; that if the *Cestuy que trust* come in a reasonable time, they may call to have the estate resold. I will lay down the rule as broad as that. The consequence will be, that trustees never will purchase but under certain circumstances; which I will mention.

These trustees were bound to sell, if they could get a reasonable price. They did every thing proper to pave the way for a sale. They had a valuation made; and they determined, as was their duty, not to let the premises go for less than that valuation. Then they find, no one goes up to that price; and

they purchased; and they are very right, provided they bought subject to the equity I mentioned. They must buy with that clog. The only thing a trustee can do to protect his purchase is, if he sees, that it is absolutely necessary, the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to this Court by motion to let him be the purchaser. That is the only way he can protect himself; and there are cases, in which the Court would permit it; as if only 500*l.* was offered; and the trustee will give 1000*l.* The consequence would be, the Court would do that, which this rule is calculated to procure. The Court would divest him of the character of trustee; and prevent all the consequences of his acting both for himself and for the *Cestuy que trust*; for the reason of the rule is, that no man shall sell to himself: a case, in which it is impossible for the Court to know, that he did not do all he ought to have done. These infants had not the guard they ought to have had; that the trustee should not act for his own benefit; and the two characters should not be united. In no other way, that I can figure to myself, except that I have mentioned, can the trustee become the purchaser without being liable to be called upon to give up the purchase. I perfectly agree with the Lord Chancellor. It was a perversion of the rule to say, no trustee should buy. There never was such a rule.

I remember a case, though I do not know what became of it, *Price v. Byrn*; in which the *Cestuy que trust* wanted to impeach a sale before the Master of ground-rents, sold twenty years before, and bought by the trustee without the sanction of the Court. Upon that case I said, if it had been impeached in a reasonable time, perhaps even in the case of ground-rents I should have set it aside; and consider the case of ground-rents. They speak for themselves. The question is, how many years' purchase they are worth. Therefore it is impossible for the trustee to have any management as to the value. But in that case after such a length of time I would not set it aside.

But see, how dangerous this is. It is impossible to know, whether any advantage has been gained. According to the Lord Chancellor, the only question, when a bill was filed, is whether any advantage has been gained by the trustee; and if so, he shall [*682] *not retain. In this case therefore, without impeaching the character of these trustees, and admitting, that they acted *bona fide*, I must hold, that they purchased subject to the equity called for by this bill. I know, it very often turns to the disadvantage of the infants: but I cannot help that. It is better to adhere to the general rule. If *cestuys que trust* should come after a great length of time, finding it a gaining bargain, I would dismiss the bill. But in this case they are infants still. I wish it to be understood, upon what terms trustees may purchase, so as to be protected from this Equity; and I repeat, there is no other way than that I have mentioned; a bill filed; and the trustee saying, so much is bid; and he will give more. The Court would examine into the cir-

cumstances; ask, who had the conduct of the transaction; whether there is any reason to suppose, the premises could be sold better; and upon the result of that inquiry would let another person prepare the particular, and let the trustee bid. This decision has no reflection whatsoever upon the conduct of these trustees; and I do not wish to have it understood, that the resale is a reflection upon them; or that they have not acted *bona fide*. But the only ground of my determination is, that they are still trustees for the Plaintiffs; and if the Plaintiffs choose to have the premises resold, they must be resold; for the trustees must not gain any advantage by the transaction.

Let it be referred to the Master to inquire, whether it is for the benefit of the Plaintiffs, that these premises shall be resold; and if the Master shall be of opinion, that it will be for their benefit, declare, that they shall be resold. Let the trustees have all just allowances; and reserve the consideration of costs (1).

Mr. *Alexander* (*amicus curiæ*) produced the following statement of *Whelpdale v. Cookson*, taken from the Register's Book (2).

There was no charge in the bill to this point. The bill was filed by a creditor against the Defendants, as against executors and trustees. The Defendants in their answer state the purchase by public auction; and the Court as to this part of the case order the creditors to elect, whether they will abide by the purchase. If the majority of them elect not to abide by the purchase, then it was to be put up again, * and sold before the Master: the [* 683] trustee to account for the profits; and to be allowed his principal money, with interest at 4 per cent. If the majority elect to abide by the purchase, the trustee was to account for the purchase-money with interest.

The MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN], upon looking at this statement said, it was exactly his opinion.

[THIS note belongs also to *Sanderson v. Walker*, 13 Ves. 601.]

As to the extreme difficulty which a trustee will find in retaining a purchase from his *cestui que trust*, see, *ante*, note 1 to *Whichcote v. Lawrence*, 3 V. 740; and, with respect to the option of a *cestui que trust* when the trust property has been dealt with in any other manner than the trust required, see the note to *Earl Powlett v. Herbert*, 1 V. 297.

(1) *Sanderson v. Walker*, *Campbell v. Walker*, *post*, vol. xiii. 601.

(2) Reg. Lib. B. 1748, folio 552. See Mr. Belt's Supplement to 1 Ves. 9; *post*, vol. vi. 628; viii. 349; x. 393.

HAIRBY v. EMMET.

[1800, DEC. 4.]

UPON a motion for a commission to take Defendant's examination the time is left to the Master, not limited by the order. (a)

MR. W. AGAR moved for a commission to take the examination of the Defendant; stating, that the practice upon a motion for this purpose of limiting the time by the order had been altered lately by the Master of the Rolls; who thought the Master the proper judge as to that.

LORD CHANCELLOR [LOUGHBOROUGH] approving that alteration, the order was made generally for a commission.

LEWES v. SUTTON.

[1800, DEC. 5.]

BILL by the Bailiff of the city of London, entitled under a grant of Edw. VI. of the execution and return of all process in the borough of Southwark, against the sheriff of Surrey for an account of the fees, dismissed.

UPON a bill by the Deputy Meters of oysters at Billingsgate, appointed by the city of London, the allowance claimed for meteage, &c. of the cargoes brought to market being established as reasonable by the verdict upon an issue, an account and payment of the arrears were decreed, [p 686, note.]

SIR WATKIN LEWES, claiming as Bailiff of the borough of Southwark under an appointment in 1784, by the mayor, commonalty and citizens, of London, who were entitled under letters patent 4th Edw. VI. confirmed by several charters and acts of Parliament (1), to the execution and return of all writs and other process of the King in the borough, filed the bill against the sheriff of the county of Surrey; praying a discovery and account of the fees received on account of any writs or process executed within the said liberty in the course of his shrievalty.

In 1791 the corporation of London brought an action in the Court of Common Pleas against — Byne, who was then sheriff, for infringing their franchise by executing writs of *feri facias*.
[*684] *The Defendant pleaded the general issue; and upon the trial before Lord Loughborough the Plaintiffs were nonsuited upon a defect in the declaration. They afterwards brought another action against the same sheriff; in which he suffered judgment to go by default. Notices were fixed up, stating the right of the city; that the writs must be sued out without the clause of

(a) 2 Smith, Ch. Pr. (Am. ed.) 135.

(1) 29 Eliz. c. 4; 29 Char. II. c. 4; 3 Geo. I. c. 11.

"*Non omittas propter aliquam libertatem*," &c. and lodged with the shériff; who was to make his precept to the bailiff; and that in case any writs containing that clause should hereafter be sued out and executed, before the precept issued to the bailiff, actions would be brought.

In the 29th year of King Charles II. a writ *de libertatibus allocandis* was directed to the sheriff; reciting the grant of King Edward VI. and the confirmation of it by King Charles II.; and commanding the sheriff to allow the mayor, &c. of London to use and enjoy their liberties and franchises. To this writ the return of the sheriff was, that the liberties and franchises were allowed. A similar writ issued, and the same return was made, in 1710; and another afterwards. In Easter Term, 12 Geo. II. an action was brought in the Court of Common Pleas by the City of London against Twells, an officer of the sheriff, for executing a writ of *fieri facias*; in which action a verdict was obtained at the assizes for the Plaintiffs.

The answer contained a schedule of writs, executed by the sheriffs, some with and some without the clause of "*non omittas*," &c.; and stated, that, wherever the precept to the bailiff was applied for, the sheriffs always issued it. The writs were made out to some officer of the sheriff, named by the party. No claim was made by the city for many years before 1791. A salary is paid to the Plaintiff by the city in lieu of profits: therefore the mayor, &c. ought to be Plaintiffs. No officers were appointed by the Plaintiff, to whom process might be directed. The Defendant insists, that the remedy is at law, if the right is infringed.

The Defendant by a farther answer admitted, that the common practice, since the writ of inquiry upon the judgment by default, has been to sue out writs with the clause of "*non omittas*," &c. in the first instance, without any default of the Plaintiff or his officers.

* The Attorney General, [Sir John Mitford], the Solicitor General, [Sir William Grant], and Mr. Cox, for the Plaintiff. [* 685] This bill is in conformity to what has been done in other cases; where, the right having been established at law, the beneficial enjoyment of that right has been given in equity. The clause of "*non omittas*" would not warrant the practice of the sheriffs; who must have known, the Plaintiff was ready to execute the process; and the insertion of that clause only gives them power to proceed, if they have any reason to apprehend default in the bailiff. But in many instances there was no insertion of that clause: as to those the Defendant has no pretence; and he does not distinguish between them. Upon the objection, that this is not a case for a Court of Equity, for a variety of purposes, where a right of this nature has been established at law, so that the Court sees, that the party is entitled to the benefit of a legal grant, which is defeated by contrivance, and the remedy at law must consist of a multiplicity of actions very difficult to sustain, and a discovery necessary, Equity will interfere. In the

case of the *Oyster Meters* (1) the Court of Exchequer proceeded the whole length of this relief in a case very similar. Undoubtedly there was a remedy at law : but discovery was essential to the relief ; and the nature of the case made it the proper subject of an account ; and so is this case. In *The Mayor and Commonalty and Citizens of London v. Perkins* (2), which is also something similar to this, the Court of Exchequer had no doubt of their jurisdiction ; but *thought it necessary first to direct an issue : [*686] but that was reversed on appeal ; and an account was decreed. Upon that case it is clear, that this is a proper subject for a Court of Equity. Other cases might be mentioned. The jurisdiction is auxiliary to the law ; giving an easier and less troublesome remedy by directing an account instead of a number of actions, to recover in damages that, to which the Plaintiffs are entitled specifically. The city of London might have been parties to this suit : but they are not necessary parties ; and in the case of the oyster meters they were not parties. The effect of the sheriff's conduct is totally to defeat this grant.

Mr. *Mansfield*, for the Defendant. This is merely an action for breach of the franchise. These grants are expounded in a singular manner. The charter giving them the complete execution and return of writs, and directing expressly, that no sheriff shall intermeddle, it is an extraordinary interpretation, that the sheriff shall grant the warrant to the bailiff ; the sheriff executing the writ by the bailiff. If the practice as to the clause of "*non omittas*" was irregular, application ought to be made to the Court, out of which the writ issues. The sheriff seeing the writ must obey it. This Court never entertained such a suit as this. The city of London ought to be Plaintiffs, complaining of the innovation of their franchise. This is not analogous to any proceeding, that has

(1) *Milbourn and several others v. Fisher and several others*. In the COURT OF EXCHEQUER, 13th May, 1783.

The Plaintiffs were deputy day-meters of oysters at Billingsgate, under the appointment of the City of London, and the representatives of others, who were dead ; and they filed the bill against persons, who brought the cargoes to Billingsgate for the purpose of sale, and the representatives of those deceased ; praying an account of all boats or vessels laden with oysters since 1775, sent to market for sale, distinguishing the number or quantity of bushels, which each vessel contained, and which were shovelled, unladen, and delivered, by the Plaintiffs, and the late deputy-meters ; a discovery, to whom the vessels belonged ; how much was due for the arrears ; an account of the assets of the parties deceased ; and that the right of the Plaintiffs to an allowance of 8s. per score bushels for the first 100 bushels, and 4s. per score for the remainder of the cargo, may be confirmed.

The Court of Exchequer directed an issue to try, whether the allowance claimed was reasonable. Upon the trial of that issue before Lord Chief Baron Skynner and a Special Jury at Guildhall the claim to that allowance was established by the verdict.

The cause coming on upon the equity reserved in the Sittings after Hilary Term, 1784, was referred to the Deputy Remembrancer to take an account of the arrears accrued ; and upon the report, stating the arrears due to the Plaintiffs to amount to 5023*l.* 10*s.* the decree was made for payment.

(2) 4 Bro. P. C. 157.

taken place in this Court. I admit, in the case of an office, to which particular duties with particular fees are annexed, as in the case of the oyster-meters, this Court will entertain jurisdiction to prevent a multiplicity of actions; especially, some of the parties being dead; the subject being mere matter of account, and the complaint, withholding from the officer certain fees, to which he is entitled. So in the case in the House of Lords, upon the duties claimed for weighing cheese, an account was wanted. The demand was simply founded upon the customary payment due. This Plaintiff does not come for any customary payment due to him; but to recover from the sheriff in the form of an account that, which belongs, as between the sheriff and the person aggrieved, if any one, to the city for an innovation upon their franchise. No action could be maintained by the city except for an innovation upon their franchise. They could not maintain an action for money had and received. If the suit could be maintained, * a great deal more ought to [* 687] be proved by the Plaintiff: 1st, that he had officers known to the sheriff, ready to execute the process. That is not proved. Then there has been a perfect acquiescence, till this bill was filed, since that action. No demand since has been proved. He ought to have given notice, that he should consider the sheriffs liable. There is no instance of an account, where the money was not due to the Plaintiff and due from the Defendant *eo nomine*. This is simply a demand for the violation of the franchise; and the city only can sustain the suit.

LORD CHANCELLOR [LOUGHBOROUGH]. There are many of these franchises in Yorkshire; which are very inconvenient. The effect of the grant according to the letter of it is to take the Bailiwick out of the County. There is a considerable inconvenience, if two applications are necessary. Where the time for the return of the writ expires, the sheriff discharges himself by saying, the bailiff has given no answer. Then there must be another writ with the clause of *non omittas*: whereas otherwise an attachment would go immediately. The question now is, whether I have any sufficient establishment of the legal right. Unless the Plaintiff could maintain an action for money had and received against the sheriff, I cannot decree an account (1). The difficulty is a strong one upon the jurisdiction; that I am making an individual sheriff, whom you catch among many successive sheriffs, fight the battle for all sheriffs of the county of Surrey. Then, can I make the sheriff account for the neglect of his officers?

The *Attorney General*, [Sir John Mitford], in reply. In *Cary v. Bacchus* (2) it was held, that an action would lie. The answer admits, that where the precept was applied for, it was issued. With respect to your Lordship's last observation it is to be observed, that the sheriff receives the benefit.

LORD CHANCELLOR [LOUGHBOROUGH]. He may, or may not. The

(1) *The Corporation of Carlisle v. Wilson*, *post*, vol. xiii. 276.

(2) *Show*. 17.

ground of coming here is convenience, to prevent a multiplicity of actions : but it would be gross injustice in the particular case ; for I should be making the sheriff account for all the defaults arising by the neglect of his officers. Then the account must be of [* 688] all the expenditure * by him in his office, all the escapes he has answered for. The sheriff cannot possibly know, if they choose to take out a writ with the *non omittas* clause in the first instance. Then I am making the sheriff answer for the default of his officers in a Court of Equity ; making him answer for the receipts of those officers whom he is obliged to appoint ; and can only take security. It brings it all back again to this ; that it is only damages for the violation of the franchise. I think, I can do nothing upon this bill.

The bill was dismissed.

As to the grounds upon which Courts of Equity will, in complex cases, take cognizance of matters of account, although the question may involve none of the peculiar doctrines of Equity, see, *ante*, note 1 to *Weymouth v. Boyer*, 1 V. 416.

JACKSON v. CATOR.

[1800, Dec. 5.]

INJUNCTION to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct ; amounting to a consent to the tenant's plan of improvement, laying out the lawn, &c.

A deed not to be varied by parol evidence of the actual agreement, [p. 688.]
Sending a surveyor to mark out trees is a sufficient ground for an injunction, [p. 688.]

THE Plaintiff was assignee of a lease, dated the 24th of October 1794, of certain fields, adjoining his dwelling-house at Beckenham in Kent, for thirty years ; granted by the Defendant ; reserving all trees and timber-like trees and pollards and all plants and shrubs, that are or may be planted. In 1795 or 1796 the Plaintiff laid part of the premises, to the extent of eleven or twelve acres, into a lawn and pleasure-ground ; and for that purpose removed a kitchen-garden and hedge-rows at a considerable expense ; planting shrubberies, and making walks, &c.

The bill prayed an injunction to restrain the Defendant from cutting down any of the trees upon the demised premises for the remainder of the term.

The Defendant by his answer admitted, he was informed by the Plaintiff of his intention to make such alterations : that he (the Defendant) saw the grounds, while the alterations were making ; and at the request of the Plaintiff met his surveyor ; and he stated, that to oblige the Plaintiff he consented, that the trees the surveyor con-

sidered necessary to be cut according to the plan should be cut ; and he consented generally to such alterations as the Plaintiff pleased ; and the trees cut were carried away by the Defendant as owner.

The surveyor proved the alterations ; that the land was converted from fields into a lawn and paddock, &c. ; and that the *cutting down the trees now left in clumps would destroy [* 689] the beauty of the grounds ; that the Defendant met him upon the premises ; and consented to cutting down some trees and leaving others in clumps ; as the Plaintiff should please ; and seemed pleased with the plan.

An injunction had been obtained ; and continued to the hearing.

The bill also took another ground ; insisting, that the right of the landlord to enter, cut, and carry away the trees, was not according to the original agreement, in support of which the Plaintiff went into parol evidence of a conversation previous to the execution of the lease ; in which the Defendant assured the lessee, he should not cut the timber ; and only reserved it, in order that that lease might be uniform with his other leases. That part of the bill was given up at the hearing ; and the relief sought was confined to the ornamental trees upon the lawn, &c. ; which was laid out in the view, and with the consent of the Defendant. The Defendant denied having an intention of cutting the trees : but he had sent a surveyor to mark them.

The *Attorney General*, [Sir John Mitford], Mr. Romilly, and Mr. Bell, for the Plaintiff. The principle of Equity is, that, when a person has stood by, seeing the act done, or has consented to it, he shall not exercise his legal right in opposition to that permission. *The East India Company v. Vincent* (1). *Stiles v. Cowper* (2). In *Brydges v. Kilburne* (3), an injunction to restrain waste was refused under the following circumstances. In 1725 a lease had been granted ; and a logwood-mill was erected. In 1775 the lease was renewed ; and in the renewed lease the mill was included under the description of a logwood-mill. Afterwards the lessee altered it to a cotton-mill of great value. The bill was filed by the landlord ; contending, that the alteration of the logwood-mill to a cotton-mill, though of great value, was waste ; and praying an injunction. There was no stipulation in the lease of 1725 as to what the mill should be. Upon the conduct of the Plaintiff in lying by, and seeing the cotton-mill erected, and afterwards approving of the Defendant's planting about the mill, Mr. Justice Buller refused the *injunction ; and mentioned *The King v. The Inhabitants of Buttern* (4), and other express authorities, that where a man encourages another to lay out money upon the

(1) 2 Atk. 83.

(2) 3 Atk. 692.

(3) June 6, 1792, cited from a manuscript note, upon a motion for an injunction to restrain waste, before Mr. Justice Buller, sitting for the Lord Chancellor ; cited also, *post*, vol. vi. 107.

(4) 6 Term Rep. B. R. 554.

supposition, that he never means to exercise his legal rights, this Court will not permit him to exercise them. That was also the opinion of the Court of Exchequer in *Hardcastle v. Shafto* (1). This injunction therefore ought to be continued during the remainder of the term; and the decree ought to be made with costs; except as to that part of the bill, for which it is admitted there is no ground.

LORD CHANCELLOR [LOUGHBOROUGH]. There was a case, I do not know, whether it came to a decree, against Mr. George Claverling; in which some person was carrying on a project of a colliery; and had sunk a shaft at a considerable expense. Mr. Claverling saw the thing going on; and in the execution of that plan it was very clear, the colliery was not worth a farthing without a road over his ground; and, when the work was begun, he said, he would not give the road. The end of it was, that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value (a).

For the Plaintiff. In the case of Mr. Russell, another case of a colliery, your Lordship restrained the proceedings upon the same ground.

Mr. Mansfield and Mr. Richards, for the Defendant. The cases cited are not applicable. They all go upon this: that the party was availing himself of money laid out; having permitted the other to act, as if the lease he had was a good lease. In the case of the cotton-mill the answer was, that the Plaintiff had suffered the Defendant to lay out his money upon that project; and therefore should let it go on. In this case the Plaintiff knew, this Defendant could exercise this right. Contemplating these improvements, why did not he enter into some communication upon the subject? Not a word passes. The right remains in exactly the same state. It is his own fault for not stipulating, that these trees never should be cut. A decree restraining this clear legal right, as to which no treaty ever took place, would go farther than the Court has ever gone.

[* 691] There is no evidence that the Plaintiff * would not have made a lawn, if these trees had not been on the land. It does not appear, therefore, that expense has been incurred in respect of the supposed engagement of the Defendant not to cut the trees; and in that point this case is distinguished from all the others. There can be no objection to taking an account of these trees. The evidence does not go farther than that: it is not said, that there is any intention to cut them; and the Defendant denies such intention. The ground of the bill therefore is, *quia timet*, without reason. Much the greatest part of the bill is that, now given up, attempting to correct the lease by parol evidence.

(1) 1 Anst. 184.

(a) 1 Story, Eq. Jur. § 388; *Storrs v. Barker*, 6 Johns. Ch. 168, 169; *S. P. Henderson v. Overton*, 2 Yerger, 394; *Brig Sarah Ann*, 2 Sumner, 207; *Tarrant v. Terry*, 1 Bay, 239; *Gray v. Bartlett*, 20 Pick. 193; *Skinner v. Stouse*, 4 Missouri, 93; *Brigt v. Boyd*, 1 Story, Cir. C. 478.

The *Attorney General*, [Sir John Mitford], in reply. In *Brydges v. Kilburne* the Plaintiff sustained a real injury; for his house had a view of the water in Beddington Park; which was intercepted by the cotton-mill: but as he had suffered the thing to go on, that did not prevail. Why did not this Defendant say, he would cut these trees?

LORD CHANCELLOR [LOUGHBOROUGH]. I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait, till they are cut down.

I do not feel, that there is any distinction, that would take the case out of the principle of all these cases, that have been alluded to; and more particularly that of *Brydges v. Kilburne*. That case comes very nearly up to this; for there was a demise of the logwood-mill at a given rent. Without doubt Brydges had a right to say, the Defendant should not put a cotton-mill there; for it might be extremely prejudicial; bringing a manufacture there that might be extremely burthensome to the parish. The absolute right in this case goes as well to cut down all, that the Plaintiff plants. The reservation of the timber is in very ample terms. It would be wrong: that proposition strikes every one forcibly; not, that it would be ungentlemanlike, but, dishonest, morally wrong; binding a man of a much coarser nature than this Defendant. In the case of the cotton-mill it was taking advantage of an interest created. Is it not just as competent to the Court to prevent an injury arising from mere spite as to prevent him from doing it in order to put money in his pocket? The objection, that the Plaintiff knew the infirmity of the title, and should have taken a security, applies to all the cases: but it is very strong here; *for he must have seen, his intention to beautify the place could not be executed without the assent of the Defendant. He acts upon it; sends his surveyor; and it is a solid improvement of the estate. The Defendant has the benefit of it; ameliorating, not merely beautifying. The only question is, whether he shall be allowed to indulge his humor to exercise that right under such circumstances. I have no difficulty in enjoining him: but it is upon his conduct since the execution of the lease, not upon the evidence of the conversation as to the agreement (1).

Both parties pressing for costs, the LORD CHANCELLOR [LOUGHBOROUGH] said, the decree must be without costs undoubtedly; the other part of the bill being clearly wrong; and it would be better to give no costs on either side than to inflame them farther by giving costs each way.

THAT Equity will restrain, by injunction, the malicious destruction of ornamental timber, even in cases where the party is punishable for waste, see, *ante*, note 4 to *Pigot v. Bullock*, 1 V. 479.

(1) *Post*, *Dann v. Spurrier*, vol. vii. 231; *Birmingham Canal Company v. Lloyd*, xviii. 515.

MORES v. HUISH.

[1800, DEC. 5.]

THE Court refused to enforce a security upon rents and profits, settled in trust to receive and pay them yearly as received to the separate use of a married woman; (a) and upon the circumstances dismissed the bill with costs. (See note (1), p. 694.)

ANN BENT, entitled under the will of her grandfather, who gave all his real and personal estate to Huish and Wright, in trust for her benefit, married Thomas Taylor, both of them being infants, without the knowledge of the trustees. Afterwards the trustees gave up part of the personal estate to Thomas Taylor, upon his attaining the age of twenty-one, in consideration of his executing articles, covenanting within six months after Ann Taylor should attain twenty-one to settle the freehold estates; and accordingly in 1790 the estates were conveyed to Huish and Wright, to the use of them, their heirs and assigns, upon trust to receive and take the rents, issues and profits, of the said premises yearly and every year, and pay the same, when and as they were received, unto Ann, the wife of Thomas Taylor; or otherwise in their discretion to permit her to receive the same and her assigns, for and during her natural life to and for her sole and separate use and benefit notwithstanding her then present or any future coverture; and her receipt alone to be a good and sufficient discharge for the same; to the intent and purpose that the same should not be subject or liable to the control, debts, or engagements, of her then or any future husband; but to be solely [* 693] at her own disposal; and *from and after her decease to pay the said rents and profits to Thomas Taylor and his assigns for life; and after his decease to convey the estates among all the children and the heirs of their bodies as tenants in common; and for default of all such issue to the survivor of Taylor and his wife, his or her heirs or assigns.

In 1798 Taylor and his wife granted an annuity of 45*l.* a-year to Mores, secured upon the said estates for the lives of Taylor and his wife and the survivor, by indentures, dated the 8th of May, 1798, and a fine levied, in consideration of 300*l.*; out of which 40*l.* was paid to the solicitor of Mores for the expenses of the transaction, and 9*l.* to John King as commission. Previously to the execution of the deeds the solicitor for the grantee wrote to Wright, to know, if there was any impediment to Taylor and his wife

(a) See *Sackett v. Wray*, 4 Bro. C. C. (Am. ed. 1844,) 483, 487, and note (c); Clancy, Rights of Women, b. 3, ch. 7, p. 316, *et seq.*; 2 Story, Eq. Jur. § 1390, and note at the end of that section; *Fettiplace v. Gorges*, 3 Bro. C. C. (Am. ed. 1844,) 8, and note (1), of Mr. Belt, in which it is said that the decision of Lord Loughborough on the principal case seems now to be wholly untenable. See also Sugden, Powers, (4th Lond. ed.) 115, 116; *Whistler v. Newman*, *ante*, 4 V. 129, note (a), and cases cited; *Hulme v. Tenant*, 1 Bro. C. C. (Am. ed. 1844,) 16-21, and the notes and cases cited in reference to the power of the wife over her separate property; *Pybus v. Smith*, *ante*, 1 V. 189, note (a).

making a good security. Wright being dead, Huish wrote an answer; stating, that Taylor had renounced all right to the real estate in consideration of a large sum of money; which he had squandered idly and extravagantly: that he and his wife could give no security; that he (Huish) never would give his consent to any mortgage or alienation; for, if Taylor was possessed of the whole, his wife and children would soon come to the parish; and that he (Huish) could say a great deal more to deter Mores from having any pecuniary connection with Taylor.

Notwithstanding this caution the transaction was concluded; and Huish refusing the first quarterly payment of the annuity, the bill was filed against the trustees, and Taylor and his wife; praying, that the payment already accrued and the future payments may be made good out of the rents and profits.

Mr. Romilly and Mr. Hollist, for the Defendants, referring to *Whistler v. Newman* (1) insisted, that under the circumstances this security could not be sustained; and also relied on an objection to the memorial registered under the Annuity Act (2) for not stating the trusts sufficiently (3).

LORD CHANCELLOR [LOUGHBOROUGH] expressed great doubt as to the power of Mrs. Taylor to give such a security; whether a trust to pay to the separate use of a married woman rents and profits from time to time is a trust to pay by anticipation.

* Mr. Richards and Mr. Hart, for the Plaintiff, referred [* 694] to *Pybus v. Smith* (4), *Ellis v. Atkinson* (5), and the other cases of that class; and observed, that the words "from time to time" do not occur in this case; though perhaps there may be found what is equivalent; but, if the direction, that the rents and profits shall be at her own disposal, does not imply a power of appointment, it is nugatory.

LORD CHANCELLOR. In *Whistler v. Newman* I made the trustees answer for a breach of trust: the subject being the interest of the wife for life. The difference of *Pybus v. Smith* and the other case is, that in those the wife had a power of appointment: that is a mere trust to receive the rents and profits, and pay them from time to time to the separate use of the wife. In *Pybus v. Smith* there were several cases, and the parties had an aspect to it in the settlement, in which she might execute the power of appointment of the whole. She might for children.

What right have I to call upon the trustees? There is no person before me, who can indemnify them, or pay them their costs, except the Plaintiff. He has notice from the trustees, that this is a bad bargain, the fullest notice. This is not a creditor endeavoring to get a security, such as he can for a just *bona fide* debt; but the

(1) *Ante*, vol. iv. 129. See also *Milnes v. Bush*, ii. 488.

(2) 17 Geo. III. c. 26; repealed by 53 Geo. III. c. 141. See the note, *ante*, vol. ii. 36.

(3) See *Bromley v. Holland*, *ante*, 610, and the references.

(4) 3 Bro. C. C. 340; *ante*, vol. i. 189.

(5) 3 Bro. C. C. 347, note, 565.

purchaser of an annuity, charged upon the interest of the wife; applying to the trustees; having notice from them, that the husband was a ruined man, and the fund secured for the separate use of the wife; who, that being taken away, must go upon the parish; and this person a creditor by an annuity of 45*l.* a-year, purchased for 300*l.*; out of which 40*l.* was deducted for the expense of the deeds, and a fine; which was quite unnecessary, and only for the purpose of swelling the expense; and 9*l.* for commission. This is an odd suit for a Court of Equity to entertain against trustees. I must applaud the trustees, instead of condemning them, for not doing that, which, if they had done, would have involved them in a breach of trust. I am inclined to dismiss this bill with costs. I should be very glad, if you would appeal. I wish to have these cases better considered.

The bill was dismissed with costs (1).

THE principal case seems to be overruled; see *Essex v. Atkins*, 14 Ves. 547. The established doctrine is, that a married woman can bind her separate property without the intervention of her trustees, unless their assent is rendered necessary by the instrument under which she takes that property. *Wagstaff v. Smith*, 9 Ves. 520. For a summary of the rules as to the power of disposition which a *feme covert* possesses over property given for her separate use, and the restrictions which may be imposed upon such disposing power, see, *ante*, the notes to *Pybus v. Smith*, 1 V. 189.

[* 695]

STUDDY v. TINGCOMBE.

[1800, Dec. 8.]

BOND upon marriage to pay a sum of money to the husband; which upon certain contingencies, to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. Upon his bankruptcy payment was decreed to the assignees. (a)

By a settlement dated the 18th April, 1788, reciting the intended marriage of John Leigh and Susanna Studdy, in consideration of the marriage and 500*l.*, paid down to Leigh by John Studdy, Leigh granted 1000*l.*, to be raised out of all his real and personal estate, to trustees: to have and to hold the said 1000*l.* immediately from and after the decease or failure in trade of Leigh upon trust, that, if the marriage shall take effect, and Leigh shall fail in trade or business, or become insolvent, or shall die in the life of Susanna Studdy leaving one or more child or children by her, or which shall afterwards be born alive, then the trustees and the survivor, &c.

(1) The authority of this case and *Whistler v. Newman*, has been impeached. See the note, *ante*, p. 17; [note (1), and cases cited. See also Clancy, *Rights of Women*, (1st Am. ed.) 317; *Fettiplace v. Gorges*, 3 Bro. C. C. (Am. ed. 1844,) 8, note (1); *Socket v. Wray*, 4 ib. 487, note (2).]

(a) See *Ex parte Milford*, 1 Bro. C. C. (Am. ed. 1844,) 399, note (a); *Stratton v. Hale*, 2 ib. 490, 492, note (a).

shall pay the interest and dividends of the 1000*l.* to Susanna Studdy for life in lieu of jointure and bar of dower ; and after her decease in trust for all and every the child and children of John Leigh by Susanna Studdy at the time of her decease, or the issue of any, that shall die before her ; the grand-child or grand-children to be entitled to the parent's share, payable to them respectively share and share alike at the age of twenty-one ; and if Leigh shall die in the life of Susanna Studdy, leaving no issue by her, nor leaving her with child, then that they shall pay her 500*l.*, half of the said 1000*l.*, within three months after the decease of John Leigh, and pay the interest of the remaining 500*l.* to Susanna Studdy for life, and after her decease pay the said sum of 500*l.* unto the executors, administrators and assigns of Leigh ; and if Susanna Studdy shall die in the life of John Leigh leaving any child or children by him, then that the trustee shall immediately upon his decease be seised of and pay the said sum of 1000*l.* unto such child or children and the issue of any deceased in his, her or their, father's life, share and share alike, at the age of twenty-one respectively ; and pay the interest in the mean time towards maintenance, &c.

The settlement contained a covenant by Leigh, that if Susanna Studdy shall be living at his decease, or if there shall be any child or children or grand-children, of him by her then living, his heirs, executors, or administrators, shall within three months after his decease or failure in trade pay to the trustees the said sum of 1000*l.* upon such trusts.

The settlement then, after reciting, that it had been [696] farther agreed, that if the marriage should take effect, John Leigh should be entitled to have the farther sum of 500*l.*, as an addition to his wife's fortune, upon the death of John Studdy, to be paid within six calendar months then after, as is expressed by the bond of John Studdy to Leigh of the same date, declared the true intent and meaning of these presents to be, that if John Leigh shall become possessed of the said 500*l.*, and die in the life-time of Susanna Studdy, leaving a child or children behind him, she shall be entitled to receive the interest thereof during so many years as she shall continue a widow ; and upon her marriage or death the same shall immediately become the property of any child or children of her by Leigh, to be shared among them, as before-mentioned ; and if John Leigh shall happen to die childless in the life of Susanna Studdy, that the said last-mentioned 500*l.* shall be immediately paid by the heirs, executors, or administrators, of Leigh to Susanna Studdy, her executors, &c. for her own use and benefit.

By the bond of John Studdy, referred to in the settlement, in the penalty of 1000*l.* reciting, that beyond the sum of 500*l.* paid John Leigh would be entitled to the farther sum of 500*l.* upon the death of John Studdy, to be paid to John Leigh, his executors, administrators or assigns, within six calendar months after the decease of Studdy, it was declared, that, if the marriage should take effect, and John Leigh and Susanna Leigh should both survive John Stud-

dy, or if John Leigh should be living at the death of John Studdy, having a child or children by her then living; or if she should be then living, having one or more child or children by John Leigh, or which should afterwards be born alive; or if John Leigh and Susanna should both happen to die in the life-time of John Studdy, leaving a child or children of their bodies lawfully begotten behind them, then if the heirs, executors, &c. of Studdy should pay the full sum of 500*l.* to the said John Leigh, his executors or administrators, within six calendar months after the decease of John Studdy; or if Susanna Leigh should happen to die childless in the life-time of John Leigh, then if the heirs, &c. of Studdy should pay to John Leigh, his executors, administrators or assigns, the annual sum of 25*l.* by equal quarterly payments from the decease of [* 697] Studdy during the life of John Leigh; or if John * Leigh should happen to die in the life-time of John Studdy, leaving no issue, nor leaving Susanna Leigh with child at his decease, then if the heirs, &c. of John Studdy should pay the said sum of 500*l.* to her, her executors, administrators or assigns, within six calendar months after the death of John Studdy; in either of the cases aforesaid the bond should be void.

The marriage took effect. In November 1788 John Studdy died. In January 1789 John Leigh became a bankrupt. The bill was filed on behalf of the three infant children of John and Susanna Leigh and by their mother and the executors of John Studdy against the assignees of the bankrupt; praying that the sum of 500*l.* may be raised out of the assets of Studdy, and secured for the benefit of the wife and children of the bankrupt; and that the bond might be delivered up.

The assignees claimed that sum of 500*l.*, for which they brought an action, as the property of the bankrupt; on the ground, that the event, upon which the interests of his wife and children were to arise, had not taken place.

Mr. *Mansfield* and Mr. *Cox*, for the Plaintiffs. In the event, that has happened, the wife and children are entitled; being the objects of the settlement, as well as that he should enjoy for his life. There is no doubt, that if he lived, and continued solvent, it was intended, that he should have the use of it; but under these circumstances this sum ought to be secured for the benefit of the Plaintiffs, to wait the contingencies, which will be determined at the death of the bankrupt. The bond provides for this sum becoming payable: but it does not rest upon the bond alone; for there is the settlement and the covenant of the husband with the trustees. An event has now happened, in consequence of which he never can make any security with regard to this sum: therefore if upon these instruments the intention appeared to be, that his executors were to pay it, and the Plaintiffs were to take his security, it does not follow, that the Court will not interpose. If it goes to the assignees, it will go to the creditors. Suppose, he had put this sum apart: your Lordship would not have held it part of his assets. If he had set it apart in

the name of trustees, that would have been considered a sufficient destination; and in this instance he is himself the trustee for his wife and children.

*The *Attorney General* [Sir John Mitford] and Mr. [*698] Short, for the Defendants, the Assignees of the Bankrupt. The question is, whether the Court can alter the settlement: otherwise the rights are clear; and rest upon an infinite number of cases. No action would have lain against Leigh. The debt does not arise till his death. The certificate will be no bar to the demand in respect of this fund. The object of the settlement was, that it should be paid to him. Then the right of action accrues against his executors upon his death, and not before. It is merely a contingent debt. The question was decided in *Ex parte Mitford* (1.) Lord Thurlow directed a value to be set upon an interest in a life annuity; distinguishing between a certain debt and a debt in contingency. As to the latter there is no such equity. The Court cannot enter into the question, whether Leigh is solvent or insolvent. There is nothing in this contract creating a lien: no covenant, that it shall be paid to trustees, or binding it in any way: but the provision is, that Leigh shall receive the money. The wife and children could not have filed a bill to impound the money. Supposing, he had set apart this money, it would be a perfectly different question. If after the marriage he had given an engagement, that it should be laid out in the funds and settled, the question then would be, whether as a voluntary settlement it should stand. The settlement makes no difference. During his life this money was to remain absolutely in his hands; and at his death upon certain events, and those events only, his assets were to become debtor. The debt is quite contingent; and cannot be proved under the bankruptcy (2).

LORD CHANCELLOR [LOUGHBOROUGH]. The only question is, whether the debt in the bond is qualified with a trust. If qualified with a trust, I could have made him settle it. Suppose, he had continued solvent: could I have decreed him to pay over this sum to the trustees? I do not know, how I could follow a sum of 500*l.* paid to him. It must have been his act. I cannot put an ear-mark upon money against his creditors. It is certainly contingent.

Mr. *Mansfield* in reply. A contingent debt cannot be proved, I admit. This is not a strict technical trust: but the object of the settlement was, that the wife and children surviving should have *the benefit of this sum of 500*l.*; and the husband [*699] certainly was to have the use of it; but bound by every moral consideration to leave it behind him. An event has now happened, in consequence of which, if paid to him, it must be lost to the wife and children. Therefore the Court ought to secure it; giving the interest only to the assignees; by analogy to the cases, in

(1) 1 Bro. C. C. 398.

(2) 1 Cooke, B. L. 212, 4th. ed.

which this Court interposes to secure property in danger. The Court now protects contingent rights; which formerly were not thought a sufficient ground for interposing. The case cited is not like this. This sum of money intended to be trusted to the bankrupt never got to his hands.

LORD CHANCELLOR [LOUGHBOROUGH]. The case before Lord Thurlow is rather stronger; for he would not permit trustees to retain trust-stock to answer a contingent debt. Here the debt upon the bond is absolute. The property was the property of the husband; that is, of his creditors. The debt due from him is purely contingent; and as such it must abide the chance of his leaving assets. It is not recoverable by any action. I can do nothing in it. I do not blame the trustees for making this question.

Direct an account of the principal and interest due upon the bond; and let the Plaintiffs, the executors of Studdy, pay over the money to the assignees; retaining their own costs; and on payment let the bond be delivered up.

SEE the note to *Ex parte Tootell*, 4 V. 372.

HOBY v. HITCHCOCK. (1)

[1800, DEC. 9.]

THE simple fact, that the Plaintiff is gone abroad, is not a sufficient ground to compel him to give security for costs. (a)

MR. W. AGAR, on the part of the Defendant, moved, that the Plaintiff may be ordered to give security for the costs; and in the mean time that all proceedings may be stayed.

The affidavit of the Defendant's solicitor in support of the motion stated, that the deponent having been informed, that the Plaintiff intended to go abroad, inquired at his late residence, where he saw the Plaintiff's brother; who informed him, that the Plaintiff was gone abroad; and was then on his voyage to the West Indies.

[* 700] *LORD CHANCELLOR [LOUGHBOROUGH] expressed a doubt, whether he could make a man, who was gone abroad, give security for costs.

In support of the motion it was said to be of course, if the Plaintiff is resident abroad, to stay proceedings, till he gives security.

LORD CHANCELLOR, applying to the Bar to know, if it had ever been decided, that a Plaintiff going abroad should give security for

(1) *Ex relatione*.

(a) 1 Smith, Ch. Pr. (Am. ed.) 555, 556; Ayckbourn, Ch. Pr. (Lond. ed. 1844,) 217, 218; 1 Barbour, Ch. Pr. 103; *Green v. Charnock*, 3 Bro. C. C. (Am. ed. 1844,) 371, and notes; 2 Madd. Ch. Pr. (4th Am. ed.) 270, *et seq.*; 1 Hoff. Ch. Pr. p. 200, *et seq.*; *Phillips v. Thornton*, 10 Legal Obs. 134.

costs, Mr. Richards said, he did not know, that it ever had been so decided. Mr. Thomson said, Lord Thurlow had decided, that he must be resident abroad.

Mr. *Agar*. In *Green v. Charnock*, (1) the case alluded to, though Lord Thurlow intimated such an opinion, the point was not decided: security being given by consent. In the late case of *Seilaz v. Hansen* (2) your Lordship made the order, where the Plaintiff was sent out of the kingdom under the Alien Act.

LORD CHANCELLOR. That case is different; as he could not return. In this case the Plaintiff may return before the cause is heard. (a) I cannot make a Plaintiff only going abroad give security for costs. (b)

The motion was refused.

SEE notes 2 to *Green v. Charnock*, 1 V. 396.

CONOLLY v. LORD HOWE.

THE COUNTESS OF BUCKINGHAMSHIRE v. CONOLLY.

[1800, DEC. 8, 10, 11.]

DECLARATIONS of a party to a deed previous to the execution admitted in support of the deed against imputations of fraud: declarations subsequent impeaching the deed, were rejected. (c)

THE object of the bill in the first of these causes was to obtain the benefit of a deed, executed by Lady Ann Conolly, the mother of the Plaintiff; by which she made an appointment in his favor of estates in Bedfordshire, discharged from the sum of 40,000*l.*; with

(1) *Ante*, vol. i. 396.

(2) *Ante*, 261.

(a) The defendant is entitled to security for costs, though there is a probability that the complainant may return at some future day, if he has actually removed from the State with his family and changed his residence. *Gilbert v. Gilbert*, 2 Paige, 603.

(b) Security will not be required of a complainant about to go abroad. *Willis v. Garbutt*, 1 Younge & Jer. 511; 1 Barbour, Ch. Pr. 103.

(c) As to the comparative effect of declarations made before, at the time of, or after making an instrument, see *Murless v. Franklin*, 1 Swanst. 13; *Trimmer v. Bayne*, 7 Ves. 508; *Langham v. Sandford*, 2 Meriv. 23; *Strode v. Russell*, 2 Vern. 625; *Thomas v. Thomas*, 6 Term R. 671; *Richardson v. Watson*, 4 Barn. & Adol. 787; *Whittaker v. Tatham*, 7 Bingh. 628; *Chetwood v. Brittan*, 1 Green. Ch. 438; *Land v. Jeffries*, 5 Rand. 211; *Webley v. Langstaff*, 3 Desaus. 509.

Evidence of a consideration, not expressed in the deed, is admissible to show that it was not voluntary, unless inconsistent with the deed itself. *Nixon v. Hamilton*, 1 Irish Eq. 55. See *Harvey v. Alexander*, 1 Rand. 219; *Lingan v. Henderson*, 1 Bland. 249; *Hare v. Shearwood*, *ante*, 1 V. 241; S. C. 3 Bro. C. C. (Am. ed. 1844,) 168, and notes; *Lord Ingham v. Child*, 1 ib. 92-95, and notes and cases cited.

which they stood charged by settlement for the Countess of Buckinghamshire and his other sisters.

The other bill was filed by Lady Buckinghamshire and the other sisters of Mr. Conolly; praying, that this deed of appointment might be set aside, as having been obtained by fraud.

[* 701] * In support of the deed Mr. Conolly read in evidence a conversation between Lord Ross and Lady Ann Conolly, upon the 8th and 16th of June; in the course of which she said, she had made her son a noble present: she had given him 72,000*l.*; meaning, as Mr. Conolly insisted, the Bedfordshire estates discharged from the sum of 40,000*l.* The deed was executed upon the 19th of the same month of June.

The Plaintiffs in the other cause offered evidence of various declarations by Lady Ann Conolly, subsequent to the execution of the deed, that she had been imposed upon; and the deed had not been read over to her.

The *Attorney General*, [Sir John Mitford], for the Plaintiff in the first cause objected to this evidence; insisting, that her declarations, after the instrument was in dispute, of the grounds, upon which she disputed it, could not be given in evidence to invalidate the instrument.

The *Solicitor General*, [Sir William Grant], and Mr. Mansfield for the Plaintiffs in the second cause.

These declarations of Lady Ann Conolly ought to be admitted; especially in such a case; for she could not have any immediate, direct, benefit by her declarations one way or the other. This evidence is in answer to that, which has been read in support of the deed. In *Filmer v. Gott* (1) this point was much agitated both in this Court and in the House of Lords; and it was held, that as the declarations of Mrs. Gott of her satisfaction with the bargain had been given in evidence, her declarations of dissatisfaction with it must also be admitted. So in this case the declarations of Lady Ann Conolly having been resorted to in support of this deed, her declarations must also be received to impeach it.

The *Attorney General*, [Sir John Mitford], in reply, observed, that the declarations now offered were quite of a different kind from those, that have been read. If Lady Ann Conolly had been Plaintiff, she could not read any declarations of her own to invalidate her own deed.

LORD CHANCELLOR [LOUGHBOROUGH]. This case is very different from that of *Filmer v. Gott*. There the conversation with Mr.

Filmer went to this; that she supposed, she was getting [* 702] the best price she could * for the estate. The intent of the evidence was to throw the reality of the consideration of natural love and affection out of the case; and then the introduction of it was such a fraud, that the bargain was to be set aside, without considering, whether the price was fair or not.

The evidence was rejected. (1)

Upon a full investigation of the circumstances of this transaction the Lord Chancellor was of opinion, that it was not liable to any imputation of fraud: the object of Mr. Conolly appearing to be only to enable himself to sell the Bedfordshire estate for the purpose of paying his debts; intending to make good the charge in another way. His Lordship observed, that an effectual security must be given; and with that view directed a reference to the Master.

Previously to the institution of the suit Mr. Conolly offered to secure the charge upon his Irish estates; which offer was rejected.

SEE the note to *Hare v. Shearwood*, 1 V. 241.

PICKETT v. LOGGON.

[1800, AUGUST 11; DEC. 12.]

THE COURT refused to vacate the enrolment of a decree, dismissing the bill with costs by default; and afterwards upon a new bill for the same purpose granted a motion for time to answer until a month after payment of the costs of the other cause; (a) adopting the practice at law.

A judgment may be vacated, while in paper; but not, when made a record, [p. 705.] Demurrer allowed in the Exchequer upon argument with 30s. costs: in another suit in Chancery between the same parties and to the same effect it was ordered on motion, that the Defendant should have time to answer till payment of those costs, but without prejudice to an application to dismiss the bill, [p. 706, note.]

A PETITION was presented on the 28th of July by John Pickett and Mary, his wife; stating the following circumstances, supported by their affidavit.

The Petitioner Mary Pickett, late Mary Ware, and Elizabeth Kerman were co-heiresses at law, and according to the custom, of William Loggon; who in October 1787 died intestate and without issue, seised of freehold and copyhold estates of the annual value of 217*l.* and upwards. His widow Dinah Loggon took possession of the estates upon his death; and in 1788 advertised for the heir. Mary Pickett and her then husband David Ware, and Elizabeth Kerman and her husband, were then in the lowest circumstances; day-laborers; the former in Yorkshire; the latter in Lincolnshire; and Kerman, the husband, then a prisoner under sentence of transportation. Mary Pickett and Elizabeth Kerman on being informed of the death of Loggon, and having received no intelligence of John Carr for twenty-five years and upwards, who, if living, would have been the heir, went to London; and applied * to the attorney of Dinah Loggon; when they were [* 703]

(1) *Marquis Townshend v. Stangroom*, *post*, vol. vi. 328. See the note, *ante*, iii. 38.

(a) 1 Smith, Ch. Pr. (Am. ed.) 165, 166; 2 Madd. Ch. Pr. (4th Am. ed.) 273, 466.

informed of the death of William Loggon: but they were also told, they were not entitled as co-heiresses; as they were not able to prove the death of Carr; and at length, advantage being taken of their ignorance and poverty, being at that time totally destitute, they were drawn in by false suggestion and suppression of the truth to sign an agreement, not previously perused by any person on their behalf; and afterwards upon the 19th of October 1788 to execute deeds, founded upon such agreement, conveying all their interest in the said estates to or in trust for Dinah Loggon and Grogan, her attorney, or one of them, for a very inadequate consideration; which deeds were also executed at Portsmouth by Kerman, then about to sail for Botany Bay. Mary Pickett executed by her mark, and under a misrepresentation of their rights, &c. No account was produced of the rents and profits received by Mrs. Loggon; and all information was withheld.

In 1792 Pickett and his wife filed the bill against Mrs. Loggon and Grogan; praying, that the conveyances may be declared to have been obtained by fraud, and set aside, &c. The cause proceeded to the examination of witnesses: the *subpœna* to hear judgment was served; and briefs were prepared, but not delivered. The solicitor for the Plaintiffs demanded 40*l.* to fee Counsel; which the petitioners raised by borrowing and pledging their apparel. They rejected an offer of 250*l.* for their claim; and Mary Pickett calling upon the solicitor to know, when the cause would be heard, was informed by him, that he would not lay out any more money; and unless they would bring him 50*l.* more for Counsel, he could not carry the cause into Court; and he recommended them to accept the offer of the Defendants; which they refused: but, being unable to comply with his demand, he suffered the cause to come on without appearing by Counsel upon the 9th of February 1796; when the bill was dismissed with costs; and upon the 4th of November following the order of dismissal was enrolled *nunc pro tunc*, to prevent the Plaintiffs from hearing the cause.

The petitioners then suggesting, that they are now of ability to hear the cause through the assistance of friends, and having received a small sum of money, prayed, that under the circumstances, and *as the merits have never been discussed, the enrolment may be vacated upon payment of costs; and that they may be at liberty to sue out a *subpœna* to hear judgment, &c.

The *Attorney General*, [Sir John Mitford], Mr. Romilly, and Mr. Short, in support of the Petition.

In this case the Court will exercise a discretion to vacate the enrolment between these parties. It is not a mere question of expedience. It is quite out of the power of the Plaintiffs to institute another suit. The delay of four years was occasioned by their extreme poverty. This is a purchase from an heir, not informed of his rights, by a person quite a stranger. In *Kemp v. Squire* (1) this

discretion was exercised, and in a case there mentioned, before Lord King ; which is very like this ; though there is in this instance the circumstance, that the solicitor refused to proceed : but that was under the very distressed situation of these parties. This is a case of great indigence in the Plaintiffs, and the conveyance of estates, proved to be of this value, obtained for less than five years' purchase. It is impossible, that it can be a fair contract upon equal terms. They could not have sold as persons conscious of their rights. The Defendant has taken advantage of having possession of the title-deeds and estates, to which she had no right. She could not even demand dower as long as she held the deeds from the heir. The form of the conveyance is absolute, with an absolute covenant for title. It is evident, the Defendants bargained only for a contingency. It appears in evidence, that no rental or particular was produced at the time of the conveyance. The form therefore ought not to interfere ; and upon paying the costs of the enrolment and such other costs as the Court shall think proper the cause ought to be set down.

Mr. Mansfield, Mr. Richards, and Mr. Alexander, for the Defendants.

Every thing your Lordship has heard, except what is stated in *Kemp v. Squire* as to the practice of the Court, is totally out of the question. If the merits are to form any part of your Lordship's consideration, the cause must be heard. Upon this petition, which the Plaintiffs do not appear to support in a regular way, it is impossible, that such a question can depend upon the merits : but the merits are misrepresented. There is no instance of doing such a thing upon such grounds : the poverty of the party ; and *that the solicitor would not go on without money ; and [* 705] this is desired at a distance of time, that would almost bar an appeal. *Kemp v. Squire* went entirely upon infancy. Poverty is no ground. The law has provided a mode, in which such persons may sue. In *Benson v. Vernon* (1) it was clear, the person was a lunatic. No irregularity or improper conduct in the Defendants with reference to this decree is pretended.

LORD CHANCELLOR [LOUGHBOROUGH]. No complaint is preferred against the solicitor. With respect to the Defendants, no misbehavior in the cause is imputed to them. I cannot go into the merits at all. I must take it for granted, that there is a substantial reason for desiring, that this cause may be heard : but I must give you credit for that. I cannot enter into a judgment of the merits. It is put certainly upon the ground of the refusal of the solicitor to go on without more money. That was a great breach of duty. I do not mean, that he was bound to advance money : but when the cause had got this length, there was a very obvious method, to go on in *forma pauperis*. It was the duty of the solicitor to put them in that course. Then there would have been the guard upon a

(1) 4 Bro. P. C. 546, cited 1 Ves. 206.

cause carried on by a pauper, putting other parties to expense : there must have been the opinion of Counsel upon the title.

In the case in Vesey and that before Lord King there was very gross neglect of an unprotected interest. The case in the House of Lords went a good deal upon the irregularity. Though the petition prays nothing with respect to the solicitor ; and states no direct complaint, he should have notice of this petition. This is a very delicate exercise of authority. A judgment, while it remains in paper, may be vacated by the Court : but when it is made into a record, it cannot be set aside. I do not see, upon what ground I can set aside this enrolment, except by imputing to the solicitor, that he has betrayed his clients, according to the suggestion in the petition, because they would not take an offer he thought a reasonable one. All the proceedings are perfectly regular. No misconduct in the cause is imputed to the Defendants.

[* 706] * No order was made (1).

The Plaintiffs afterwards filed another bill ; praying the same relief, upon which the Defendants presented the bill of costs of the former cause ; which were taxed at 280*l*.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Hood*, moved, that the Defendants may have time to answer the bill till the end of one month after the Plaintiff shall have paid the costs of the former suit ; and that all process for contempt in the mean time may be stayed ; alleging in support of the motion the rule at law in case of a non-suit (1).

The *Attorney General*, [Sir *John Mitford*], Mr. *Romilly*, and Mr. *Short*, for the Plaintiffs said, it was done at law only in cases of ejectment ; and no case was to be found in this Court, except *Holbrook v. Cracroft* (2) and in that case the bill was dismissed upon the merits, not, as in this instance, by default.

Lord CHANCELLOR, [LOUGHBOROUGH], granted the motion ; adopting the practice at law (3).

[THIS note belongs also to 14 Ves. 215.]

1. A judgment at law, when taken by default, may be set aside on motion, but not when the merits have been gone into : and, by analogy, the enrolment of a

(1) *Charman v. Charman*, *post*, vol. xvi. 115 ; *Stevens v. Guppy*, 1 Turn. 178 ; Enrolment obtained by surprise, vacated.

(2) Lord Raym. 1308 ; *Melchart v. Halsey*, 3 Wils. 149.

(3) *Holbrooke v. Cracroft*. In CHANCERY, 18th June, 1795.

The Defendant demurred to the bill in the Court of Exchequer between the same parties ; and upon arguing the demurrer it was allowed, with 30*s*. costs.

Upon motion in this Court to stay proceedings, and for time to answer, until the Plaintiff had paid the costs directed by the order of the Court of Exchequer, the Counsel for the Plaintiff admitted, that the bill here was to the same effect as that filed in the Exchequer ; and it was upon this allegation and upon reading the order of the Court of Exchequer that the Court ordered, that the Defendant should have time to answer the Plaintiff's bill until the Plaintiff should have paid the costs of the bill in the Exchequer pursuant to the order of that Court ; but that order was to be without prejudice to the Defendant's applying to this Court to have the Plaintiff's bill dismissed. Entry Book, A. 1795, fo. 427.

(4) *Wild v. Hobson*, 2 Ves. & Bea. 105. See Beames on Costs, 210, 211.

decree will not be vacated on motion, at any rate when the merits of the case have been gone into. *Charman v. Charman*, 16 Ves. 116. The distinction receives some countenance from the rule, that a plea of a former suit ought to show that it was absolutely *res judicata*. *Brandlyn v. Ord*, 1 Atk. 571.

2. Although a bill may have been dismissed on the merits, yet if the plaintiff in that suit acquire the legal estate, so that the former defendant is forced to become plaintiff in a new suit, the cause is open, and the whole merits must again be gone into. *Sawyer v. Bleasoe*, 2 Vern. 329.

3. That a fine, constituting part of an assurance obtained by undue means, is no bar to relief in Equity, see, *ante*, note 1 to *Toulmin v. Price*, 5 V. 235.

4. Under a general agreement to sell a fee-simple estate, free from incumbrances, the covenants to which the purchaser will be entitled must depend on the nature of the vendor's title, and whether he holds by purchase for valuable consideration or by descent. *Church v. Brown*, 15 Ves. 263.

5. No doctrine of Equity is more difficult of application than that which authorizes the avoidance of a contract upon the ground that one of the parties has taken advantage of the other's distress; but, generally speaking, there can be no title to such relief where the advantage or disadvantage of the contract depended upon subsequent contingencies, which might turn the balance either way, and the result of which must have been equally precarious to each party at the time of the contract. *Ramsbottom v. Parker*, 6 Mad. 6; *Paine v. Meller*, 6 Ves. 352; *Pritchard v. Ovey*, 1 Jac. & Walk. 403; *Revell v. Hussey*, 2 Ball & Bea. 287; *Gowland v. De Faria*, 17 Ves. 25. In the principal case, however, all the advantage of contingencies was reserved to one party, who was to be exempted from all disadvantage in respect of those contingencies; there was no *mutuality* in this dealing, and mutuality is necessary to the fairness and good faith of every contract. *Martin v. Mitchell*, 2 Jac. & Walk. 428; *Crossley v. Parker*, 1 Jac. & Walk. 465; *Copplestone v. Foxwell*, 2 Freem. 150; *Birley v. Gladstone*, 3 Mau. & Sel. 217; *Ex parte Whitaker*, 1 Rose, 302; and see also *Hitchcock v. Giddings*, 4 Price, 140. Mere inadequacy of price, certainly, will not vitiate a contract; but oppression, evinced by taking advantage of a party's ignorance or distress, or by exercising any other undue influence over him, will be a good ground, not only for refusing specific performance of a contract so extorted, but for rescinding a conveyance actually executed, or, at most, allowing it to stand only as a security for the consideration actually paid; and in such cases, acquiescence under the transaction, or even a subsequent ratification of it, may not preclude relief, but merely be proofs of the same ignorance and distress on one side, and of the same undue influence on the other, in which the fraudulent bargain originated: see the notes to *Croue v. Ballard*, 1 V. 215, and notes 1 and 2 to *Wharton v. May*, 5 V. 27: though, when parties come to an agreement respecting a doubtful question, prejudice to one side will not of itself be sufficient ground for annulling the compromise, if that was entered into fairly, and after a full and equal communication, by each party, of all the facts within his knowledge bearing on the subject. See note 4 to *Gibbons v. Caunt*, 4 V. 840.

6. As to the care which Courts of Equity take to prevent the privilege of suing *in forma pauperis* from being converted into a means of vexation to others; and the rule that, before a second suit will be admitted, the costs of a former suit, instituted, *in forma pauperis*, for the same matter, must be paid; see the note to *Ex parte Shaw*, 2 V. 40.

SMITH, *Ex parte*.

[1800, DEC. 24.]

ORDER in bankruptcy to tax the solicitor's bill for striking the docket and a journey to get an affidavit of debt; being business relating to the bankruptcy, though previous to it.

ON a petition in bankruptcy to tax the solicitor's bill of costs, Mr. *Hart*, in support of the petition, said, that the only doubt made was, whether the Lord Chancellor sitting in Bankruptcy [*707] is a Court within the Act of Parliament (1); and clearly his Lordship has authority to make the order within the words of that act; which are very large.

Mr. *Pemberton*, *contra*, made another objection; that this bill was not for business done in the bankruptcy, but previously; namely, striking the docket, and a journey to Maidstone to get an affidavit of debt.

LORD CHANCELLOR, [LOUGHBOROUGH]. If a solicitor charges 100*l*. for striking a docket, shall I allow that? It is business relating to the bankruptcy (2).

The order was made.

1. INDEPENDENTLY of the statute 2 Geo. III. c. 23, s. 22, Courts, both of Law and Equity, have under their general jurisdiction, authority to refer an attorney's bill for taxation, upon motion by a party in the cause in which any of the costs were incurred; though the bill may include charges for business done in other matters: *Bignot v. Bignot*, 11 Ves. 328; *The King v. Bach*, 9 Price, 354; *Wilson v. Gutteridge*, 3 Barn. & Cress. 158: the usual course, in Courts both of Law and Equity, is to order the whole of the attorney's bill to be taxed, when any part of it concerns business done in that Court to which application is made; and it is held immaterial whether part of the business was done on behalf of other persons, as well as the person applying for taxation. *Margerum v. Sandisford*, 3 Brown, 234; *Hill v. Humphries*, 2 Bos. & Pull. 345.

2. It should be observed, however, that it has been held, items of charge for agency business cannot be referred for taxation on the application of the client in whose cause such agency business was transacted: *Wildbore v. Brian*, 8 Price, 680: still it must not be inferred, that bills for agency are not taxable; that doctrine has, indeed, been held in more than one instance; (*Anonymous case*, 1 Wils, 266; *Binstead v. Barefoot*, 1 Dick. 112); but there are other, and more numerous cases, in which the order has been made: *Dixon v. Plant*, 1 Dougl. 200, n.; *Ex parte Bearcroft*, *ibid*; *Paget v. Nicholson*, 1 Dick. 285; *Corner v. Hake*, 2 Cox, 173: the application, in such cases, should proceed, not from the client, but the attorney by whom the agent was immediately employed. *Ex parte Steele*, 16 Ves. 164.

3. The costs of a solicitor for attending the House of Lords, in a cause, are, of course, subject to taxation: but there is a great difference between this and soliciting an act of Parliament, which business may be undertaken by any unprofes-

(1) 2 Geo. II. c. 23, s. 22; 6 Geo. IV. c. 16, s. 14.

(2) *Post*, *Ex parte The Earl of Uxbridge*, vol. vi. 425; *Ex parte Arrousmith*, xiii. 124; *Ex parte Westall*, 3 Ves. & Bea. 141; *Ex parte Neale & Inman*, Buck, 111, 129. See several instances collected by Mr. Beames on Costs, 330: but it is not of course: particular objections must be stated: *Ex parte Sutton & Brereton*, 4 Madd. 395, 479.

sional person. A bill where no business has been done in any *cause*, or with relation to a commission of bankruptcy, is not subject to taxation in Courts of Equity, because there is no criterion by which their officer can be enabled to tax such costs, nor any certain means to which he might resort for assistance: *Ex parte Wheeler*, 3 Ves. & Bea. 22; *Williams v. O'Dell*, 4 Price, 281: the same reason applies to the taxation of costs of proceedings under a commission of review of the sentence of the Court of Delegates: the Court of Chancery has no proper officer to tax the costs of such a proceeding; which emanates from the King in council. *Ex parte Fearon*, 5 Ves. 647. On similar principles, a solicitor's bill for business done, in the affairs of a charity of royal foundation, before the Lord Chancellor, as exercising the visitatorial power of the Crown, is not within the statute for taxing bills of costs; for such proceedings are not before the Chancellor in the exercise of his equitable jurisdiction; but, in his personal capacity, as the ministerial officer of the Crown. *Ex parte Dann*, 9 Ves. 548. And with respect to a solicitor's bill for business done exclusively in the Court of Great Sessions in Wales, where nothing beyond costs is in dispute, the Court of Chancery will not order the bill to be taxed. But, when other equities are involved with the question of costs, it may be as much for the interest of solicitor as of the client, that the Court of Chancery should direct taxation, as a preparatory step to the farther relief. *Ex parte Partridge*, 2 Meriv. 501; *S. C.* 3 Swanst.; *Ex parte The Earl of Uxbridge*, 6 Ves. 425.

4. The general rule, adopted by all Courts for their guidance as to the exercise of their jurisdiction over their officers, as to the matter of costs, seems to be this; where an attorney is employed in business wholly independent of his professional character, no summary interference will be exercised. But where the employment is so connected with his professional character, as to afford a presumption, that such character formed the ground of his employment by the client, there the Court will exercise a summary jurisdiction, and direct taxation, provided it has an officer whose proper duty it is to tax the costs of such business as that in respect to which the application is made. *In the matter of Aikin*, 4 Barn. & Ald. 49.

5. All the general principles of Courts of Law and of Equity, with respect to taxation, have been adopted in bankruptcy; (*Ex parte Arrowsmith*, 13 Ves. 125;) and a bill, previously taxed by the commissioners, may be retaxed by the Master: *Ex parte Westall*, 3 Ves. & Bea. 141: such retaxation, however, is not in every case of course; particular objections should be stated; (*Ex parte Brereton*, 4 Mad. 479;) unless in cases where the solicitor refuses to give a copy of his bill; such refusal would be sufficient ground for a reference to the Master. *Ex parte Sutton*, 4 Mad. 395. And, indeed, by the 14th section of the Consolidated Bankrupt Act, stat. 6 Geo. IV. c. 16, any creditor, who has proved to the amount of twenty pounds under a commission of bankrupt, seems to be entitled, as a matter of right, to a reference to the Master, upon a mere expression of dissatisfaction as to the settlement of costs made by the commissioners: who, subject to such reversal, are, by the just-cited enactment, empowered to settle all fees or disbursements of any solicitor or attorney employed under a commission; provided such bills do not contain any charge respecting any action at Law, or suit in Equity.

6. For business done in striking a docket, or other preliminary matters, before the choice of assignees, it may be inferred, that the solicitor's demand is against the petitioning creditor personally; *In re Gibson*, 1 Glyn & Jameson, 303; *Ex parte Johnson*, 1 Glyn & Jameson, 24; upon the principle according to which the petitioning creditor alone has been determined to be personally responsible for the fees of the messenger, up to the choice of assignees; *Burwood v. Felton*, 3 Barn. & Cress. 44; *Ex parte Johnson*, *ubi supra*; *Ex parte Hartop*, 9 Ves. 109; at least, where the messenger has not distinctly recognized some other employer, as the party to whom he was to look for payment: *Hartop v. Jackes*, 2 Mau. & Sel. 439; *Ex parte Burwood*, 2 Glyn & Jameson, 70: a doubt, however, seems to have been entertained, whether a solicitor might not be allowed to petition that the assignees should be ordered to pay his bill of costs, for business done previously to the choice of such assignees, instead of leaving him to make his demand, for business done up to that time, against the petitioning creditor exclusively. *Ex parte Haynes*, 1 Glyn & Jameson, 36.

7. When, after an order for taxing a solicitor's bill, he brings an action for the taxed costs, without deducting the costs of taxation, when he is liable thereto, his

action will be stayed. *Ex parte Bellot*, 4 Mad. 380; *Ex parte Westall*, 3 Ves. & Bea. 141.

8. If the assignees neglect to tax the bill of costs of the solicitor employed in working the commission, a creditor may present a petition for that purpose; taking care to serve the assignees with the petition: *Ex parte Walker*, 1 Glyn & Jameson, 95: but the necessity for this step can scarcely arise, since the provision for the taxation of costs in bankruptcy, made by statute, as above cited; except in those cases where the bill comprises charges in respect of some suit in Equity, or action at Law.

9. A bill of costs for prosecuting a commission may be taxed after payment, or even after the death of the assignee who paid it. *Ex parte Neale*, Buck, 111.

10. A client cannot be compelled to pay, over again, to the clerk in Court, costs which he has once paid to the solicitor; the clerk in Court however, will not be ordered to deliver up any papers which may have come to his hands, in the course of the cause, until he is paid: *Bray v. Hine*, 6 Price, 210: and where the client has not paid the costs to his solicitor, it seems, that the clerk in Court may, in Equity, pray payment of his bill, either against the solicitor, or the client; although he could not proceed at law against the client, for want of a retainer. *Anonymous case*, Mosely, 172. However this may be, it is quite clear that a demurrer will not hold to a bill brought by a clerk in Court for his fees, against the solicitor who employed him. *Barker v. Dacie*, 6 Ves. 689.

REYNOLDS, *Ex parte*.

[1800, Dec. 24.]

ASSIGNEES of a bankrupt removed on the ground, that one of them had purchased the bankrupt's estates under the commission for himself. (a) A re-sale was directed; and the purchaser to account for a profit gained by him upon a re-sale of part: but he was discharged from the purchase only conditionally; in case the re-sale should produce more.

THE prayer of this petition was, that the assignees under the commission of bankruptcy might be removed; on the ground, that one of them had himself purchased the estates of the bankrupt under the commission by auction.

Mr. Romilly, in support of the petition said, that according to the rule now established by *Whichcote v. Lawrence* (1) and *Campbell v. Walker* (2) the assignees cannot be the purchasers; even supposing their conduct to be perfectly fair; which he denied.

The Attorney General, [Sir John Mitford] for the assignee, who purchased, insisted, that the conduct of the assignees was fair; but admitted, that according to the rule now established they could not be the purchasers.

LORD CHANCELLOR, [LOUGHBOROUGH], said, clearly they could not; and ordered that they should be removed.

Mr. Piggott for the other Assignee, who did not purchase, contended that the order ought not to extend to him.

(a) See note (a), to *Campbell v. Walker*, ante, 678, and the cases there cited; *Whichcote v. Lawrence*, ante, 3 V. 740, note (a); 3 Sugden, Vend. & Purch. (6th Am. ed.) 150, [225] [226] et seq.

(1) *Ante*, vol. iii. 740; see the note, 752.

(2) *Ante*, 678.

Lord CHANCELLOR [LOUGHBOROUGH]. He permitted his co-assignee to purchase; and being a party in the business, it is not fit he should manage *the affairs of the creditors. [*708] Therefore both of them must be discharged (a).

Direct the estates to be resold; and this petition to stand over in the mean time; for if the estate should not sell for more than the assignee has given, I shall hold him to his purchase; and as it appears, that he has sold part for 75*l.* more than he gave for it, he must also account for that. I set aside the purchase only conditionally; in case the future sale shall produce more (1).

It is a broad general rule, that no man shall sell to himself; in other words, that persons standing in situations of trust, cannot be permitted to purchase what they are employed to sell; thereby bringing their personal interests and their duty into direct conflict: see, *ante*, the notes to *Whitchote v. Lawrence*, 3 V. 740. This general rule is strictly applicable to assignees under a commission of bankruptcy, who are trustees for the benefit of the creditors and of the bankrupt; the consequence is, that if assignees purchase, or take a lease of, any part of the bankrupt's estate, without having the consent of the creditors for so doing, or their subsequent approbation of the act, the transaction cannot stand: if, before it is rescinded, they have made any benefit thereby, they must account for it; if they have sustained a loss, they must bear the disadvantageous result of an act which the Court cannot approve. *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacy*, 6 Ves. 628; *Ex parte Hodgson*, 1 Glyn & Jameson, 14; *Ex parte Lewis*, 1 Glyn & Jameson, 70; *Ex parte Buxton*, 1 Glyn & Jameson, 357; *Ex parte Bage*, 4 Mad. 460. Both the principle and the practice are the same, with respect to purchases by the solicitor employed to work a commission. *Ex parte Bennett*, 10 Ves. 383; *Ex parte James*, 8 Ves. 347.

JAMES, *Ex parte*.

[1800, Dec. 24.]

UPON a bankruptcy, proof of debt under bonds securing an annuity was rejected on the ground, that a bill accepted for the arrear not being dishonored till after the bankruptcy, the bonds were not forfeited at the bankruptcy. The bonds being void under the Annuity Act, there being no enrolment of one and the consideration of the other not being truly stated, petition to be admitted a creditor for the sums advanced was dismissed on the ground, that, the petitioner having insisted on his securities at the date of the commission, it was not the same debt.

IN December 1799 the petitioner purchased from George Field an annuity of 100*l.* a year in consideration of 500*l.* The annuity was secured by the bond of Field and other persons. In January

(a) As to the liability of one trustee for the faults, &c., of his co-trustee, see *Scarfield v. Howes*, 3 Bro. C. C. (Am. ed: 1844,) 90, 95, and notes; *Sadler v. Hobbs*, 2 ib. 114, and notes and cases cited; *Clark v. Clark*, 8 Paige, 153; *Williams v. Nixon*, 2 Beavan, 472; *Sutherland v. Brush*, 7 Johns. Ch. 22, 23; *Edmonds v. Crenshaw*, 14 Peters, 166; 2 Story, Eq. Jur. 1280, *et seq.*; *Monell v. Monell*, 5 Johns. Ch. 296; *Massey v. Curton*, 1 Cheves, Ch. 181.

(1) *Ex parte Serle*, 1 Glyn & Jam. 187; *Ex parte Bage*, 4 Madd. 459.

1800 the petitioner purchased another annuity of 100*l.* a year from Field in consideration also of 500*l.* and secured by the bond of the same persons.

Upon the 31st of May, 1800, one quarter's arrear upon these annuities being then due, the petitioner drew upon Field, for 50*l.* at twenty-five days' date. Field accepted the bill: but before it became due he stopped payment; and upon the 19th of June a commission of bankruptcy issued against him. The bill therefore was not paid.

The petitioner offered to prove his debt under the commission: but the proof was rejected on the ground, that the bill must be considered as payment of the arrears (a); and the bill not being dishonored at the date of the bankruptcy, no arrear was then due; and therefore the bonds were not forfeited.

The bonds being clearly void under the Annuity Act (1) the consideration of the first not being truly stated in the memorial (2), and there being no enrolment of the other, the prayer of the petition was, that the petitioner may be admitted a creditor under the commission for the sums actually advanced by him; and that the bankrupt's certificate may be stayed.

[* 709] *Mr. Cox, in support of the Petition.—Mr. Romilly and Mr. Bell, for the Assignees.

LORD CHANCELLOR, [LOUGHBOROUGH], dismissed the petition, on the ground, that the petitioner, having insisted on his securities at the date of the commission, it was not the same debt (3).

THE inconvenience, not to say injustice, of the rule in bankruptcy, which refused to admit proof in respect of any growing claims under an annuity, unless the bond for payment of the annuity was broken, and the penalty forfeited, previously to the grantor's bankruptcy, was remedied by the statute 49 Geo. III. c. 121, s. 17, the substance of which now forms the 54th section of the Consolidated Bankrupt Act of the 6 Geo. IV. c. 16, it is now immaterial as to the admission of proof, whether there are, or are not, any arrears due upon the annuity at the time of the bankruptcy; nor, in this respect, is there any difference whether the annuity is merely a personal one created by bond, or secured upon real estate: *Ex parte Artis*, 2 Ves. Sen. 489; *Ex parte Key*, 1 Mad. 428: in either case the annuity must be valued, and proof to the amount of such valuation will be admitted; but, by the 108th section of the statute last cited, if the annuitant's security do not give him a specific *lien* on some part of the bankrupt grantor's property, he can only come in for payment *pari passu* with other creditors; and, if he have received any payments subsequently to the bankruptcy, they must be deducted from the amount of his proof. *Ex parte Key*, *ubi supra*. As to the principle upon which the value of an annuity is to be calculated, whenever the case arises in bankruptcy, see, *ante*, note 2 to *Frankes v. Cooper*, 4 V. 763.

(a) How far a note or bill is to be considered payment of the demand for which it is given, see Chitty, Cont. (6th Am. ed.) 768, note (1), and cases cited; Bayley on Bills, (2d Am. ed.) 395-413.

(1) 17 Geo. III. c. 26; repealed by 53 Geo. III. c. 141. See the note, *ante*, vol. ii. 36.

(2) See *Byne v. Vivian*, *ante*, 604, and the references.

(3) By statute 6 Geo. IV. c. 161, s. 54, the value of an annuity may be proved. See the mode of estimating it, *Ex parte Whitehead*, *post*, vol. xix, 557; 1 Mer 10, 127; 2 Rose, 258.

BUTTERWORTH v. ROBINSON. (1)

[1801, JAN. 29.]

INJUNCTION against a colorable Abridgment of the Term Reports, among other Law Reports, till answer or farther order upon certificate of the bill filed. (a)

MR. ALEXANDER, for the Plaintiff, moved, upon certificate of the bill filed, for an injunction to restrain the Defendant from selling a work, entitled "An Abridgment of Cases argued and determined in the Courts of Law," &c. until answer or farther order. A copy of the work was handed up to the Lord Chancellor.

In support of the motion it was stated, that this work was by no means a fair abridgment; that, except in colorably leaving out some parts of the cases, such as the arguments of Counsel, it was a mere copy *verbatim* of several of the Reports of Cases in the Courts of Law, and among them of the Term Reports; of which the Plaintiff is proprietor; comprising, not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles; to give it the appearance of a new work.

In support of the motion *Bell v. Walker* (2) was cited.

LORD CHANCELLOR [LOUGHBOURGH]. I have looked at one or two cases, with which I am pretty well acquainted; and it appears to me an extremely illiberal publication. Take the injunction upon the certificate of the bill filed; to give them an opportunity of stating what they can upon it.

It was not brought before the Court again (3).

For a statement of the general rules in restraint of literary piracy, see, *ante*, the notes to *Cary v. Faden*, 5 V. 24.

(1) Reg. Book, A. 1800, fo. 136.

(a) Eden on Injunct. (2d Am. ed.) 327, *et seq.*; *Carnan v. Bowles*, 2 Bro. C. C. (Am. ed. 1844,) 80, 84, 85, and notes; 2 Story, Eq. Jur. § 939, 940, and the discussion of this subject in note (2); *Campbell v. Scott*, 11 Sim. 31; *Gray v. Russell*, 1 Story, Cir. C. 11; *Saunders v. Smith*, 3 Mylne & Craig, 711, 728, 729; *Wheaton v. Peters*, 8 Peters, 591; *Cary v. Faden*, *ante*, 24, note (b).

It is a piracy to collect together and reprint from Law Reports all the cases on a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decision and notes. *Hodges v. Welsh*, 2 Irish Eq. 266. See *Wheaton v. Peters*, *supra*; *Bramwell v. Halcomb*, 3 Mylne & Craig, 737.

(2) 1 Bro. C. C. 451.

(3) 2 Atk. 143; *Doddsley v. Kinnorsley*, Amb. 403; 4 Esp. 168; 1 Campb. 94. After Trinity Term, 1823, a piracy of this work, under the pretence of abridgment, was stopped by injunction: *Vesey v. Sweet*. After a reference to the Master, as in *Carnan v. Bowles*, 2 Bro. C. C. 80, and ——— v. *Leadbetter*, *ante*, vol. iv. 681, the Defendant gave up all the copies to be cancelled.

CLOUGH v. CLOUGH.

[ROLLS.—1801, JAN. 26; FEB. 3.]

ARTICLES on marriage to settle estates of the husband and wife of equal value in strict settlement, and providing portions: the wife's estate being withdrawn by decree on the ground of her infancy, the younger children were confined, as against the eldest, to half the portion: the articles providing in the event of no issue male, in which case the estates were to separate, that each should bear a moiety; though they also contemplated the case of the wife's refusal to be bound; providing against it by the forfeiture of her interest.

Under a joint covenant to raise a sum of money the whole may be recovered from either, [p. 717.]

By articles, previous to the marriage of Richard Clough and Patty Butler, an infant, it was witnessed, that in consideration of the marriage and of the settlement thereafter agreed to be made by Richard Clough of part of his real estates in the county of Denbigh, Patty Butler with her guardians consented and agreed, and Richard Clough covenanted and agreed with Sir Charles Gould and Thomas Clough, that Patty Butler and Richard Clough would convey her moiety of all the estates of her father deceased according to contracts entered into for sale, and would assign her moiety of the money to be received therefrom and from the personal estate of her father according to her appointment by deed or will; and that in consideration of the marriage, and for making some provision for Patty Butler and her issue by Richard Clough, and for limiting and settling, as well her moiety of the real estates of her father as also the whole of the copyhold estates, her said guardians consented and agreed, and Richard Clough covenanted and agreed, that Patty Butler and Richard Clough and all and every other person or persons claiming by, under, or in trust for, them would, in case the said intended marriage should take effect, and Patty Butler should live to attain the age of twenty-one, within three months after she should have attained that age, convey all her moiety of the residue and remainder of the said manors, tenements and hereditaments, as well freehold as copyhold and leasehold, late the estates of her father, which should not be decreed to be conveyed in performance of the said contracts, to which she was entitled as one of his two daughters, co-heiresses, in the county of Sussex, and the whole of the copyhold estate within the manor of Amberley, to which she had been admitted (as the youngest child, according to the custom) to and upon the several uses and trusts, &c. aftermentioned; and Richard Clough covenanted, that he and his heirs and all persons claiming under him would within twelve months from the date of the articles convey such part of his real estate in the county of Denbigh as should be equal in value to her said moiety to and upon the same uses and trusts.

The articles then proceeded to declare the uses and trusts: namely, to the use of Sir Charles Gould and Thomas Clough, their

executors, &c., for ninety-nine years, in trust for raising and paying an annuity of 300*l.* a-year to Patty Butler during their joint-lives, payable out of the rents and profits of the said several estates, to her separate use ; and, subject thereto, to the use of Richard Clough for life, with power to cut timber and a provision for supporting contingent remainders ; and after his decease, as to her moiety of the mansion-house and premises called Warminghurst Park, that the same should be settled for the use of Patty Butler for life ; and as to all the residue of the said estates, thereby agreed to be settled, to the intent that she might out of the rents and profits of all the said estates, except only the moiety of the said mansion-house, receive an annuity of 1000*l.* a-year, to be secured by a term of 200 years, as a jointure, in bar of dower ; and after the decease of Richard Clough, then as to all and every the said estates so to be settled, except the said mansion-house, charged with the said annuity of 1000*l.* a-year, to the use of trustees for 500 years ; and subject thereto and to the said annuity, to the use of the first and other sons in tail male ; remainder to trustees for a term of 1000 years ; and subject thereto, as to the moiety of Patty Butler of all the said manors, &c., late of her father, and the copyhold estate at Amberley, in case of failure of issue male, as aforesaid, and she should survive Richard Clough, to the use of Patty Butler, her heirs and assigns ; and in case he should survive her, and there should be such failure of issue male, as aforesaid, then to the use of all and every the daughter and daughters, if more than one, equally, as tenants in common in tail general ; with cross-remainders ; and in default of such issue to the use of such persons, and for such estates, &c., as she should appoint, notwithstanding coverture ; and for want of appointment, and as to such parts, whereof there should be no complete appointment, to the use of her right heirs for ever.

As to the estates of Richard Clough so agreed to be settled, in case of failure of such issue male, as aforesaid, and Richard Clough should survive Patty Butler, the use was declared to be for him and his heirs ; but, in case she should survive him, then to the daughters, &c., with limitations similar to those of her estates ; and in default of such issue, to the use of Richard Clough, his heirs and assigns.

* The trust of the term of 500 years of the said manors, [*712] &c. (except the moiety of the mansion-house, &c., called Warminghurst Park) was declared to be, that in case there should be one or more child or children of Richard Clough and Patty Butler, whether male or female, besides an eldest or only son, the trustees should in the life-time of Richard Clough and Patty Butler with their consent, or else not till their decease, by leasing, selling or mortgaging, the said manors, &c., or a competent part thereof, raise the sums of money for the portion or portions of such younger child or children, as aftermentioned : that is to say ; if their should be but one such younger child, then such younger child should have the sum of 6000*l.* for his or their portion ; and in case there should be

two or more such younger children, should the same be a son or sons, daughter or daughters, or both, then such two or more children should have the sum of 12,000*l.*, and no more, for their portions; to be paid as Richard Clough or Patty Butler or the survivor should appoint by deed or will, and for want of appointment, equally to be divided between them, share and share alike, to a son or sons at the age of twenty-one; and to a daughter or daughters at that age or marriage; with a clause of survivorship, in case any younger son should become an eldest, or any younger son or daughter should die, before his or her portion should be payable; with a provision for maintenance and education, and for advancement.

The trust of the term for 1000 years was declared to be, in case there should be no issue male, or, being such, all of them should die without issue male, and at the time of the failure of such issue male there should be one or more daughter or daughters, with the like consent and in the same manner to raise the following sums of money for the portion or portions of all and every such daughter and daughters: that is to say; if but one, 6000*l.*; if two or more, 12,000*l.*, and no more, for her or their portion or portions; to be paid as Richard Clough or Patty Butler or the survivor should appoint by deed or will; and, in default of appointment, equally, share and share alike, at the age of twenty-one or marriage; which should first happen after their deaths; or in their lives with their consent or that of the survivor: so as that one moiety of such [* 713] portion or portions, so to be raised and paid, be *raised and paid by and out of the moiety or half part of her the said Patty Butler of and in the said manors, &c., and premises, so intended to be limited and settled, as herein before mentioned, or some part thereof: and the other moiety, out of the said lands of Richard Clough in the county of Denbigh so to be limited and settled, as herein before mentioned; with a clause of survivorship, if any daughter should die, before her portion should be payable; or if all die, before any of their portions should become payable, then the said portion was not to be raised and paid; and upon farther trust, in case there should be no issue male, and there should be one or more daughter or daughters, for providing maintenance, not exceeding the interest at 4 per cent.: one moiety of such yearly sum to be raised out of the rents and profits of the moiety of Patty Butler in the said hereditaments and premises so intended to be limited and settled; and the other moiety out of the rents and profits of the said other lands of Richard Clough, so agreed to be settled, in like manner as the portions.

It was farther agreed, that, if at any time after Patty Butler should have attained the age of twenty-one she should refuse or neglect to join in settling the said moiety of the real estates of her father, &c. then the use or estate agreed to be limited to her after the decease of Richard Clough, if she should survive him, of and in the said hereditaments and premises of Richard Clough in the county of Denbigh for her life, as part of her jointure, should be void; and she

should take no benefit or interest under such said limitation of those estates in the county of Denbigh for her life; and the said estate should go over to the use of such person or persons as if she were dead. The marriage took place soon afterwards: but no settlement was ever executed. Richard Clough died intestate in 1784; leaving three sons, the only issue of the marriage. The estates in the county of Denbigh were encumbered, so that it was found impracticable to make a conveyance of any part according to the articles. The performance of the articles on the part of Richard Clough being therefore suspended, Mrs. Clough on that account and on the ground of her infancy at the date of the articles, and not having done any act in affirmance of them since she attained twenty-one, which was previous to the death of her husband, declined performing her part. In 1785 a bill was filed on behalf of the children *against their mother; praying an execution [*714] of the articles. By a decree made by Lord Thurlow in that cause it was declared, that Mrs. Clough was not bound by the articles; and the bill was dismissed (1).

This bill was filed by the two younger sons, the eldest of whom, of the age of eighteen, was in the army, and the other, of the age of seventeen, was desirous of entering with a merchant, against the eldest son, entitled as heir at law to the estates of his father, and against the trustees in the articles and the widow; praying, that the articles, and the covenants therein, or such of them as are capable of being performed, may be executed; and that the Plaintiffs may be declared entitled out of their father's estates subject to the articles to have the interest of 12,000*l.* applied for their maintenance, &c.; or, if the Court shall be of opinion, that upon attaining the age of twenty-one they will be entitled only to the sum of 3000*l.* each, then a similar direction as to the interest of that sum; and that a proper sum may be raised and applied for their advancement.

Mr. *Richards* and Mr. *Roupel*, for the Plaintiffs. The question is, whether the Plaintiffs are entitled to 12,000*l.*, to 6000*l.*, or to any thing. Under the language of these articles all and every part of the estates are subject to them. They are as much entitled to the sum of 12,000*l.* out of their father's estates, though their mother's estate is gone out of the settlement, as if her estate had been recovered by a paramount title. Where one estate only is to be liable, the articles show that intention. Then the words must have their proper effect, where no such intention is expressed. The parties stand in equal rights, and have equal equities. No favor is due to one in preference to the others. They are all purchasers for valuable consideration. It will be said, we are here upon articles. Why should there be a liberal construction of articles, where the same construction ought to prevail, if the contract stood upon a deed? If the words are clear, they must prevail: if not clear, in the case of articles, as in every other case, the construction must be accord-

(1) See 3 Wooddes. 453; 4 Bro. C. C. 510.

ing to the intention, as the Court can collect it. The single instance, in which articles have been reformed is, where the effect would be to give the parent an estate tail, instead of a limitation in [* 715] * strict settlement ; and the reason, upon which that case rests, is, that the husband would have the power of defeating the articles, which were intended to bind him.

In this case the length of the articles, their technical form, and the circumstance, that they contemplated every possible case, and provided against the very event, that has happened, the refusal of Mrs. Clough to abide by them, bind the Court to the strict construction. A settlement in pursuance of these articles could not be made in any other way than in the very words of them.

Mr. Sutton and Mr. Cox, for the Defendant, the eldest son. If the last clause of the articles did not oppose such a construction, it might be contended, that in the event, that has happened, one of the parties having receded from the contract, the other is not bound ; and therefore the Plaintiffs could have no interest whatsoever : all, that the father agreed to, being to bring an equal property into settlement : but upon the last clause the Defendant cannot contend, that the Plaintiffs have not a right to some provision ; for certainly Mr. Clough did provide for the event of her refusing to bring her estate into settlement. The only question therefore is, whether the Plaintiffs are entitled to 12,000*l.*, or to 6000*l.* only. Upon the plan of this settlement, so long as both estates were to continue vested in the same person, there was no reason to provide, that each estate should bear only half the charge : but as soon as the estates should separate, which they necessarily would, in case there should be no son, it was necessary to provide for that, and that produced the clause in the creation of the term for 1000 years ; which is not in that of 500 years : the reason applying to the event of the separation of the estates not being applicable to the case of their going in the same channel. The mother availing herself of her infancy, the estates have separated. The eldest son is protected in this Court. It was upon the condition of his having both estates that he was to be subject to the charge of 12,000*l.* by this contract ; and this attempt is to impose upon him the double charge ; though he takes only the estates of his father.

The Court is called upon to execute articles. In the cases alluded to the parents, professing to mean to make a provision for [* 716] * their children, execute that purpose in a way, that leaves the whole in their own power ; and in the cases of that sort the articles have been reformed against the father or mother. The question now arises between infants : the eldest son at least as well entitled to the protection of the Court, and as much the object of the articles. It does not follow from the provision in the last clause, that, if the intention of these parties had been called to this point more particularly, in case a settlement had been executed, they would not have provided, that in the event, that has happened, the whole sum should not be raised. The language of the limita-

tions, especially in the term of 1000 years, imports, that the burthen was to be borne equally by the two estates : but it was not thought necessary to make an express provision for that purpose, so long as the eldest son was to enjoy both estates.

Mr. *Richards* in reply. The articles certainly are prepared in a very singular manner ; especially as to the trusts of the term of 1000 years : but that is confined to the single case of failure of issue male. Suppose, the estate of the wife had been recovered by a paramount title : would that circumstance take away the provision made by way of portion for the younger children ? Suppose, only a small part of the estate had been so taken away, a circumstance, that must frequently have happened : has the eldest son ever set up a claim to an abatement against the younger children ? If the Defendant is right, he must be entitled to an abatement in such a case ; the computation going upon what the eldest son is to take. The younger children are purchasers of the portion affecting every acre in the settlement. The mother in this respect is an adverse claimant. This is certainly a hard case upon the Defendant : the value of the estate being very little beyond 12,000*l.* : but he is in the nature of a legatee. This is like the case of a joint covenant to raise a sum of money ; upon which either may be sued for the whole, and have his remedy for a contribution against the other.

In *Harvey v. Ashley* (1) Lord Hardwicke with reference to this point (2) states the difference between agreements on marriage and other agreements ; that upon the former the non-performance on one part should be no impediment to the children's receiving the full benefit of the settlement ; for the children considered as purchasers *are entitled to all the benefit of the uses [*717] under the settlement, notwithstanding there has been a failure on one side. The question certainly is, what was the intention in a given case ; supposing it to have been at all in contemplation. It is evident from the last clause, they supposed, Mrs. Clough might not assent to the articles ; there is nothing, showing the intention in that event as to this point ; and then the words must have their course. It is not enough to ask, what they would have done, if this had been particularly pointed out to their contemplation ; or if the instrument had been made on better advice.

Feb. 3d. The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] stated the case ; and delivered his opinion :

In the suit, instituted upon the bill filed against Mrs. Clough, Lord Thurlow by a decree, which must be satisfactory to every one, was of opinion, that an infant cannot be bound by any article, entered into during minority as to her real estate (a) ; but may refuse

(1) 3 Atk. 607.

(2) 3 Atk. 611.

(a) The doctrine of the text is sustained by many subsequent cases. See *Milner v. Lord Harwood*, post, 18 Ves. 259 ; *Sanford v. M'Lean*, 3 Paige, 117 ; *Colcock v. Ferguson*, 3 Deaux. 482 ; *Eagle Fire Co. v. Lent*, 6 Paige, 635 ; *Lee*

to be bound, and abide by the interest the law casts upon her; which nothing but her own act after the period of majority can fetter or affect (1). The husband being dead, and the wife still persisting in not carrying into effect the articles, from which she was absolved by Lord Thurlow's decree, the two younger sons have now filed this bill; calling on the Court to provide out of the estate of the eldest son the whole sum of 12,000*l.*; and insisting, that, where parties covenant, more particularly, where a husband covenants for his wife, for the purpose of making a provision for the children, though the wife's fortune shall not be carried to the account, so as to form part of the fund (a), yet he shall in that case make good the provision out of his own funds; and it was resembled to the case of two men covenanting jointly to raise a given sum; in which case it is very truly said, the covenantee has nothing to do with the contribution between them; but he *may bring his action against either; and recover the whole from one; leaving him to his remedy against the other.

It is said, that clause, upon which my opinion principally depends, providing, that in case of failure of issue male the portion should be raised in moieties out of each estate, is confined to that particular event, the failure of issue male; and is applicable to no other case. I argue very differently upon that; for who are the contracting parties? Really and substantially the children of the marriage. In truth it is a contract between the husband and wife, in which all the children are considered as purchasers, and their interests are as much to be attended to, as if they were in *rerum natura*, stipulating for themselves. Then the eldest son is just as much an object as the others; and it is strange to say, the effect is to be the same as

ter v. Frazer, Ril. Ch. 76; S. C. 2 Hill, Ch. 541. See also *Caruthers v. Caruthers*, 4 Bro. C. C. (Am. ed. 1844,) 512, note (c); 513, note (g); 2 Kent, (5th ed.) 243-245; 4 ib. 55, *et seq.*; *Williams v. Chitty*, ante, 3 V. 545, note (a).

A release of dower by a *feme covert* infant is an act *in pais*, and may be avoided on her arriving at full age. *Oldham v. Sale*, 1 B. Monroe, 77. See also *Jones v. Todd*, 2 J. J. Marsh. 361; *Sanford v. M'Lean*, 3 Paige, 117.

As to other acts of infants, whether void, voidable or binding, see *Durnford v. Lane*, 1 Bro. C. C. (Am. ed. 1844,) 114, note (b).

(1) Wooddes, 453. Upon that case and *Caruthers v. Caruthers*, 4 Bro. C. C. 500, the point remained in doubt after the decision of *Drury v. Drury*, 5 Bro. P. C. 570; 4 Bro. C. C. 505, n.; Co. Lit. 36 b. note 7; 2 Eden, 39; Wilson, 177; followed by *Chitty v. Chitty*, ante, vol. iii. 545; and *Smith v. Smith*, ante, 189. The result of those authorities is, that a female infant may be barred of her right to dower by a provision by way of jointure, if competent and certain. [So held in *M'Cartee v. Teller*, 2 Paige, 511. See also 2 Kent, (5th ed.) 243, 244; *Williams v. Chitty*, ante, 3 V. 545, note (a).] Her interest in money also may be bound by agreement on her marriage; as otherwise the husband would be absolutely entitled to it. See Mr. Fonblanque's note, Treat. on Eq. vol. i. 74; and *Milner v. Lord Harwood*, post, vol. xviii. 259; where Lord Eldon, 275, declares his concurrence with the opinion of Lord Northington and Lord Thurlow against the decision in the House of Lords. *Corbet v. Corbet*, 1 Sim. & Stu. 612.

(a) Where a married woman joined her husband in a deed of her land and in the covenant of warranty therein, she was held not to be bound by such covenant, and not suable on it. *Wadleigh v. Glines*, 6 N. Hamp. 17; *Colcord v. Swan*, 7 Mass. 291; *Sauyer v. Little*, 4 Vermt. 414; *Aldridge v. Burlison*, 3 Blackf. 201.

if both estates had been joined, as the articles intended; and then the eldest son would have had the whole; and the meaning must be taken to be, that, if ever the estates are divided, as they would be in that given case, one estate should bear one moiety of the charge, and the other should bear the other moiety; and the reason, why it was not provided for, except in that case, was to give the eldest son, taking both estates, the choice of raising it out of either. Under these circumstances I will not, sitting here, and the eldest son being a minor, declare, that the younger children are entitled to raise out of the husband's estate the whole sum of 12,000*l*. I cannot so declare, without totally contradicting the articles, and doing essential injury to the eldest son, as much an object of the care of this Court as the others; and these articles being executory, and therefore only to be carried into execution.

Declare, that the Plaintiffs are entitled to the interest of 6000*l*. out of the estates of their father, covenanted by him to be settled.

THAT a female infant is not bound by a covenant, (though entered into on occasion of her marriage,) with respect to her *freehold* property, but that her personality may be bound by the agreement of her parents or guardians, on her behalf, before her marriage, see, *ante*, note 1 to *Johnson v. Boyfield*, 1 V. 315.

[* 719]

THE MARQUIS OF HERTFORD v. BOORE.

ASTON v. BOORE.

[1801, FEB. 6.]

A VENDOR cannot come at any distance of time for a performance: but upon a bill, filed fourteen months after the correspondence upon the objections to the title ceased by the Defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the Master. (a)

THE bill was filed for the specific performance of an agreement for the purchase of an estate. Upon the 25th of October 1792 the Defendant purchased by auction an estate at Exning in the county

(a) See a full consideration of this subject of delay in completing purchase in 1 Sugden, Vend. & Purch. (6th Am. ed.) ch. 5, § 1, 2, 3. See also *Lloyd v. Collett*, 4 Bro. C. C. (Am. ed. 1844,) 469-472, and notes.

In Equity time may be dispensed with, if it be not of the essence of the contract. *Hepburn v. Auld*, 5 Cranch, 262; *Brashier v. Gratz*, 6 Wheat. 207; *Getchell v. Jewett*, 4 Greenl. 350; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Garnett v. Macon*, 6 Call, 308; *Wells v. Smith*, 2 Edw. 78; *Runnels v. Jackson*, 1 How. (Miss.) 358.

It is not generally deemed to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. 2 Story, Eq. Jur. § 776, and numerous cases cited in the note.

If circumstances of a reasonable nature have disabled the party from a strict compliance; or if he comes *recenti facto* to ask for a specific performance, the

of Stafford, belonging to the Marquis of Hertford, for 780*l.*; and paid a deposit of 5 per cent. By the conditions of sale the remainder of the purchase-money was to be paid, and the conveyance executed, on or before the 5th of April following. The abstract was delivered on the 26th of February; and objections were taken to the title by the Defendant's solicitor, as not covering the whole of the premises described in the particular. Upon that subject a correspondence took place between the solicitors; beginning upon the 15th of April 1793. The vendor went upon evidence of uninterrupted possession for sixty-seven years of the acres in question, and, since 1749, under a receiver appointed by the Court. The correspondence, as it appeared in evidence by admission continued down to the 3d of December 1793; and the Plaintiff's solicitor by a letter, dated the 29th of November 1793, threatened to file a bill; which was not actually filed till the 25th of January 1796.

The Defendant by his answer submitted upon the correspondence, that by the conduct of the Plaintiffs and their inability or neglect to show a good title to the premises the Defendant has suffered material inconvenience; having purchased the premises for his residence; and that he was induced to consider the contract abandoned; and that at this distance of time and under the circumstances he ought not to be compelled to perform it.

At the hearing the Plaintiffs proved a continuance of the correspondence down to November 1794; in which month the last letter was written by the Plaintiff's solicitor; calling for a distinct answer; and saying, that otherwise he must be under the necessity of filing a bill. To that letter no answer was returned by the Defendant, nor was any notice given to the Plaintiff, that he considered the contract abandoned: nor had he brought any action for the deposit; which still remained in the hands of the auctioneer.

[* 720] *The Attorney General, [Sir John Mitford], and Mr. Fonblanque, for the Plaintiffs.

Mr. Piggott and Mr. Raynsford, for the Defendant. The delay, that occurred, since the bill was filed, certainly was accidental; pro-

suit is treated with indulgence, and generally with favor by the Court. But then in such case it should be clear that the remedies are mutual, and that the chance of gain by delay is not all on one side and that of loss all upon the other. See *Alley v. Deschamps*, 13 Ves. 228; *Rogers v. Saunders*, 16 Maine, 99, 100; *Brashier v. Gratz*, 6 Wheat. 539; Fonbl. Eq. b. 1, ch. 6, § 12, note (e).

It should also be clear, that there has been no change in circumstances affecting the character or justice of the contract. *Pratt v. Law*, 9 Cranch, 456, 493, 494; *Mech. Bank of Alexandria v. Lynn*, 1 Peters, 383; *Taylor v. Longworth*, 14 Peters, 172; and that compensation for the delay can be fully and beneficially given. *Pratt v. Law*, *supra*. See farther upon this subject, 2 Story, Eq. Jur. § 776, and notes.

For other cases and circumstances, which are said to render time of the essence of the contract, see *Criffin v. Heermance*, 1 Clarke, 133; *Falls v. Carpenter*, 1 Dev. & Bat. 277; *Rogers v. Saunders*, 16 Maine, 92, 97-100; *Goodwin v. Lyon*, 4 Porter, Eq. 297; *Hayes v. Hall*, *ib.* 374; *Scott v. Fields*, 8 Ohio, 92; *Doar v. Gibbs*, 1 Bai. Eq. 371; *Wells v. Smith*, 7 Paige, 22; *Hill v. School District*, &c. 17 Maine, 316. See farther *Pinche v. Curtis*, 4 Bro. C. C. 329; *Newman v. Rogers*, *ib.* 393, and note (a).

ceeding from the derangement of the affairs of the Defendant's solicitor; who absconded some time ago. No advantage therefore can be taken of that. But the time, that elapsed previously to the filing of the bill from the termination of the correspondence, was a period of fourteen months; which is quite a sufficient answer to the bill within the principle established by *Harrington v. Wheeler* (1) and *Lloyd v. Collett* (2). The observation (3) of the Master of the Rolls in *Fordyce v. Ford*, that he hopes, it will not be gathered from hence, that a man is to enter into a contract, and think, that he is to have his own time to make out his title, applies particularly to this case.

The Attorney General, [Sir John Mitford], in reply. In all those cases, in which the Court held, that the vendor had not a right to compel a performance of the contract, he had not produced a title. In this case a good title was made early.

LORD CHANCELLOR [LOUGHBOROUGH]. I am very much inclined to the general idea adopted in these cases; that a vendor is not to come at any distance of time: but in this case they took steps with expedition; put the Defendant in possession of the abstract; to which objections were taken; which might have been obviated. Every thing was done by the Plaintiffs to avoid a suit: the last act, calling for a distinct answer; and saying, that otherwise they must be under the necessity of filing a bill. They take a good deal of time upon that: but one can easily imagine, circumstances might have happened, that would have made it peevish to have done it immediately.

I do not think, I can avoid sending this to the Master.

THAT *laches* may preclude a party from insisting on specific performance of an agreement, which might have been enforced had he shown due promptitude, see, *ante*, note 2 to *Eaton v. Lyon*, 3 V. 698; and to the authorities there cited, add *Crofton v. Ormsby*, 2 Sch. & Lef. 604: if neither party take any timely step to quicken the other, this may amount, on both sides, to an acquiescence in, and waiver of, the delay. *Jones v. Price*, 3 Anstr. 925; *Pincke v. Curteis*, 4 Brown, 332.

(1) *Ante*, vol. iv. 686.

(2) 4 Bro. C. C. 469, *ante*, vol. iv. 689; see the note, 691; *Omerod v. Hardman*, *Guest v. Homfray*, *post*, 722, 818. In *Milward v. Earl Thanet*, at the Rolls, March the 24th, 1801, the bill for a specific performance was dismissed. The parties differed as to the construction of the agreement; and the bill was delayed for seven years. Lord Alvanley, then Master of the Rolls, observed, that Lord Kenyon was the first, who set himself against the idea, that had prevailed, that, when an agreement was entered into, either party might come at any time; but that it is now perfectly known, that a party cannot call upon a Court of Equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager.

(3) 4 Bro. C. C. 498.

SMITH v. SMITH.

[ROLLS.—1801, FEB. 9.]

MONEY laid out by the intestate on repairs of houses, which descended to his eldest son, as heir, is not an advancement, to be brought into hotchpot under the statute: otherwise, if the houses had been given to the son in the father's life.

A QUESTION arose upon exceptions to the Master's report; whether the sum of 587*l.* 12*s.* 6*d.*, paid by the intestate for repair of houses, was paid to the Defendant, his eldest son, as an advancement; and was therefore to be brought into hotchpot, under the Statute of Distributions (1): the Plaintiff, the son of the younger son of the intestate, alleging, that the houses, upon the money was expended, were given by the intestate in his life-time to the Defendant; and did not descend to him as heir. The Defendant produced evidence of the intestate's promise to repair: and, the Master's report stating, that the said sum was paid as an advancement, took the exception, on the ground that the money was paid by the intestate in consequence of his promise; and the houses on his death, which happened after the repairs were done and the money paid, descended to the Defendant, as his eldest son and heir.

Mr. Piggott, in support of the Exception, was stopped by the Court

Mr. Wooddson and Mr. Taunton, for the Report cited *Edwards v. Freeman* (2), as an authority, that even a portion depending on a contingency must be brought into hotchpot; and upon the evidence contended, that these houses were the property of the Defendant by gift in his father's life.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I am afraid, I am not at liberty to decide in favor of the infant child of the younger son; unless the intestate had irrevocably parted with the premises. I agree, if he had vested that estate in his son, and afterwards given him a sum of money to ameliorate it, that would have been an advancement: but as he did not part with the estate, I do not apprehend, under the words of the Statute this money laid out upon it could be an advancement. Suppose, he had made a will; and given the houses away from his son; or sold them. At his death he might, if he thought fit, have given them to any one else; and therefore laying out this money upon them during his life was no advancement * to the son. Then at his death they descended to the eldest son with the amelioration as heir at law. Under the circumstances therefore this cannot be considered an advancement to the eldest son.

The exception was allowed. _____

THE fifth section of the statute 22 and 23 Car. II. c. 10, (commonly called the Statute of Distributions,) after providing that, before a final distribution of an in-

(1) 22 & 23 Char. II. c. 10.

(2) 2 P. Wms. 435.

testate's effects takes place, any advancement made by him in his life-time to his children, shall be brought into hotch-pot, makes a distinction in favor of the heir, who is to take an equal part in the distribution, with the rest of the intestate's children, without any consideration of the value of any *land* which he hath by descent, or *otherwise*, from the intestate. But it is only as to real estate that the heir at law is exempted by the statute from bringing into hotch-pot any advances made to him in his father's life-time; if the heir have received any advancement by money or personal estate of any kind, that is to be reckoned as part of his share. *Pratt v. Pratt*, Fitzgibb. 84; *Anonymous case*, 2 Freem. 190. It seems, that where any child takes under his father's will part of the testator's personal estate, and there is an intestacy as to the residue, the child can take a share of that, without bringing into hotch-pot what he took under the will; though it is now understood to be settled law, that what is taken under a will must be deemed an advancement in the life-time of the testator; *Onslow v. Mitchell*, 18 Ves. 494; *Leake v. Leake*, 10 Ves. 489; *Goolding v. Haverfield*, M'Clel. 357; but Lord Eldon thought that, to *such* advancements, the provision of the statute, as to bringing into hotch-pot, did not apply. *Twisden v. Twisden*, 9 Ves. 426. Of course, though what a child takes under his parent's will, is, for all other purposes, held to be an advancement made in the parent's life-time, what the child takes under the parent's intestacy can never be so considered. *Onslow v. Mitchell*, and *Twisden v. Twisden*, *ubi supra*.

BUCHANAN v. HAMILTON.

[1801, FEB. 11.]

ONE of three trustees under an Act of Parliament being gone abroad, and having released, there being no provision for the change of trustees, upon a bill it was referred to the Master to appoint a new trustee.

AN Act of Parliament was obtained for the sale of estates which were settled upon various limitations in strict settlement: the incumbrances exhausting the rents and profits. The Act vested the estates in three trustees, upon trust to sell, &c.: but there was no provision made for the change of trustees. Mr. Scott, one of the trustees, being appointed Attorney General of Canada, executed a release and went to Canada; and under these circumstances the bill was filed against the two remaining trustees: praying a reference to the Master to appoint a new trustee. No opposition was made.

Mr. *Bell*, for the Plaintiffs, said, this was the common case. The legal estate was in the trustees; and the trustee, who had gone abroad, had released.

LORD CHANCELLOR [LOUGHBOROUGH] referred it to the Master to appoint a new trustee.

SEE the note to *Millard v. Eyre*, 2 V. 94.

IN THE DUCHY COURT OF LANCASTER.

CHAMBRE, *Justice*. GRAHAM, *Baron*.

OMEROD v. HARDMAN.

[1800, JUNE 18. 1801, JAN. 27; FEB. 7, 14.]

APPEAL to the Chancellor of the Duchy of Lancaster from a decree of the Vice-Chancellor, dismissing the bill, affirmed by him on a rehearing on the petition of the Plaintiff.

Bill for specific performance of a contract for sale of an estate upon various objections to the title dismissed in the first instance without a reference. (a)

Specific performance not of right, but in the discretion of the Court, (b) [p. 734.]

An estate having once borne a charge in favor of legatees or creditors is discharged; though the fund has been misapplied by the trustees, [p. 736.]

The time for performance of a contract is material, (c) [p. 736.]

LAWRENCE TAYLOR, seised to him and his heirs, on the 1st of November, 1788, for more effectually securing the payment of his just debts and other purposes surrendered to the use of [* 723] Benjamin * Wilson and the Plaintiff and the survivor and his heirs, to stand fined and seised of the premises upon the uses and trusts mentioned by indentures of equal date.

By those indentures, between Lawrence Taylor and the trustees, the trusts are declared; that they should with all convenient speed absolutely sell and dispose of the same by auction or otherwise for the best price, that could be got for the same: or if the said feoffees should be mindful to raise money on all or any part of said premises by way of mortgage, and not to sell or dispose of the same, they should have power to raise so much money as should be thought necessary by way of mortgage on all or any part of said premises for the uses and trusts after mentioned: namely, so much as should be thought sufficient to pay off and discharge all the just debts of Lawrence Taylor, after all his personal estate and effects should have been applied in discharge thereof; and also that the feoffees should receive the rents, issues and profits, of the premises,

(a) When there is a doubt about the title, it is usually referred to a Master for examination and report. *Pierce v. Nichols*, 1 Paige, 246; *M'Combe v. Wright*, 4 Johns. Ch. 659, 670.

(b) See *Cooper v. Denne*, *Denne v. Cooper*, *ante*, 1 Ves. 565, note (a), and cases cited. And the Court will not decree a specific performance, where there is a doubtful title. *S. C.* 4 Bro. C. C. 80, (Am. ed. 1844,) 88, note (a), and cases cited on the subject of doubtful or defective title. See also to the same point *Roake v. Kidd*, *ante*, 647, note (a), and cases cited.

(c) The cases to this point are cited in note (a), to *Marquis of Hertford v. Boore*, *Aston v. Boore*, *ante*, 719; 1 Sugden, Vend. & Purch. (6th Am. ed.) ch. 5, § 1, 2, 3, p. 293, [403] *et seq.*; *Newman v. Rogers*, 4 Bro. C. C. (Am. ed. 1844,) 393, and note (a).

and keep down the interest yearly, as it should become due ; and, after payment thereof and the expenses of the trust, pay Lawrence Taylor 20*l.* a year during his life ; 12*l.* a year to his wife for life in bar of dower, if she should choose to accept the same ; and not otherwise ; 10*l.* a year to his son James Taylor during his life ; to his daughter Mary, the legal interest of 400*l.* (1), payable yearly at the expiration of eighteen months from his decease during her life ; and in case she should leave any child or children, then the interest thereof to be paid towards maintenance and education, of him, her, or them, till the youngest should attain the age of twenty-one ; and then the said sum of 400*l.* to be equally divided among them, share and share alike ; and in case they should all die before the youngest son should attain twenty-one, then the said sum of 400*l.* to cease and sink into the said premises ; and after payment and satisfaction of all the said debts, annuities and charges, to pay the overplus money yearly remaining out of the rents and profits and other effects, that should remain in their hands, unto his son Lawrence Taylor and his assigns ; and when the said trusts should be fully ended and satisfied, to surrender all said premises, which should not be sold, to his said son Lawrence Taylor, his heirs and assigns for ever.

* Lawrence Taylor died in 1797. Soon after his death [* 724] the Plaintiff, the surviving trustee, entered into a contract in writing with the Defendant, executed on the 5th of October, 1797, to sell him the trust estates for the sum of 1680*l.*, to be paid on or before the 1st of May next after the execution of a good title ; and on the 7th of July, 1798, the bill was filed in the Court of Chancery of the County Palatine of Lancaster against the purchaser for a specific performance of that contract.

When the cause was heard, James Taylor, the second son, was a lunatic ; and had been so for many years. The widow was living ; and the daughter Mary still unmarried. In 1790 the trustees had made a mortgage, comprising the premises afterwards sold to the Defendant, but not confined to them, for 1700*l.* and from an account in evidence it appeared, but not distinctly, that they had previously sold some part of the premises.

The Defendant took possession of such part of the lands as were in possession of the widow, except the buildings, being about three sevenths of the whole, and continued in possession till May, during which time he exercised acts of ownership ; letting off part ; digging, planting ; and impounding a cow trespassing on the premises. The heir having about the same time got into possession of the house with the widow, the purchaser required an abstract ; which was delivered in March ; and then he objected to proceed in the contract.

The general ground of objection taken by the Defendant, that the Plaintiff could not make a good title, rested upon the following

(1) The expression was "the legal interest of 400*l.* a year."

points: that upon the construction of the deed the trustees, having mortgaged, had no power to sell: the want of the usual clause, that the receipt of the trustees shall discharge the purchaser; the charges in favor of the widow, children and grand-children; that the widow had not waived her dower, and accepted the annuity; the possession taken by the heir against the consent of the purchaser; that the heir and widow were not parties; and that the possession had not been delivered according to the actual agreement. With respect to that objection the answer stated, that it was at the same time agreed, though not made part of the written agreement, that the [*725] Defendant should be let into possession of the *meadow on the 2d of February, of the arable and pasture on the 25th of March, and of the housing and building on the 1st of May; being the usual times in that country for the purchasers to take possession. The Defendant also stated, that he believes there will be a deficiency to answer the charges.

The bill was dismissed by the Vice Chancellor with costs. The Plaintiff being dissatisfied with that decree, the cause was upon his petition re-heard before the Vice Chancellor; and the decree affirmed on the 13th of June, 1799.

The Plaintiff then appealed to the Chancellor of the Duchy (1); and on the 18th of June, 1800, the Earl of Liverpool, Chancellor, said, he had understood, a doubt had arisen respecting the jurisdiction of the Duchy Court at Westminster to review the decree of the Vice Chancellor at Lancaster: but a search had been made in the records of the Court, which left no doubt, that the Court had such appellate jurisdiction (2).

The appeal, being then adjourned, came on again before CHAMBRÉ, Justice, and GRAHAM, Baron.

(3) Mr. Piggott and Mr. Stanley, for the Plaintiff. Upon a bill for specific performance of a contract it is not necessary to bring before the Court any other persons than the parties to the contract; and the usual course is upon a reference to the Master for him to report what is necessary to be done, and who should do it, under the direction of the Court, and for that purpose, that such persons should be made parties. The objections made by this Defendant are such as it is the usual course to refer to the Master. In a case before Sir Thomas Sewell, and afterwards upon a rehearing before Lord Thurlow, where a purchaser had been kept out of possession many years by the unlawful possession of a person, who had conveyed his estate to trustees to sell, that was not considered a sufficient ground for

(1) In *Brown v. Higgs*, in Chancery, Sittings after Trinity Term, 1801, Lord Eldon, Chancellor, expressed great doubt, whether, after a decree at the Rolls, affirmed upon a rehearing at the Rolls, between the same parties, the unsuccessful party can appeal to the Lord Chancellor. A search was made; and no instance could be found. The appeal however was heard: *post*, vol. viii. 561. See xvi. 214; *M'Intosh v. Townshend*, xvi. 330; *Fox v. Macreth*, 2 Cox, 1581; *Hargr. Jur. Tracts*, 451; *Blackburn v. Jepson*, 2 Ves. & Bea. 359.

(2) Said 1 Vern. 443, *Addison v. Hindmarsh*, to be by Act of Parliament.

(3) The arguments *ex relatione*.

withholding the reference to the proper officer to inquire into the validity and circumstances of the objection, with a view to enforce performance of the contract. The reference * is, [* 726] to inquire, whether the vendor can himself make a good title, or has the means of compelling others, who ought to join with him in making such title, so to do. *Cooper v. Denne* (1) came on upon the Master's report, after a reference had been direction.

Serjeant *Clayton* and Mr. *Hall*, for the Defendant. Upon the answer and the evidence all the necessary facts are before the Court; and a reference for the purpose of any farther information is useless. No circumstance, that has occurred since the original hearing, ought to form any ingredient in the judgment to be pronounced. No advantage therefore can be taken of the recovery in ejectment against Lawrence Taylor the son since the original decree. The facts as disclosed on the pleadings, justify the decree; showing, that the vendor could not make a good title. If a cloud appears upon the title, that will justify a dismissal of the bill; and this title is liable to various objections. Possession was not delivered according to the parol agreement; which must be taken into consideration, upon the authority of *The King v. The Inhabitants of Laindon* (2): where it was decided, that a parol agreement may constitute an integral part of a written agreement; or that one agreement may be part parol and part written. The deed empowers the trustees to sell or mortgage, in the alternative. They did mortgage in 1789; and they now contend, that a power remained in them to sell in 1798. If sufficient money has been once raised to pay the debts, &c. more cannot be raised by the trustees under the trust: however that money has been applied. That was decided by the House of Lords (3): the land having once borne the burthen by raising the money is discharged. The answer puts the point in issue; whether sufficient money has been raised; and the heir by his entry on the trustee claimed the estate as his.

Another objection arises as to the application of the mortgage money. There is no clause of indemnity. If the fund is only a secondary fund, the purchaser is required to see, that the primary fund has been applied: *Culpepper v. Aston* (4). Here the trust is to raise so much only as the personal estate will not pay. The purchaser therefore purchases at his peril. He is not to be compelled to take a title, that would or might subject him to a Chancery *suit. In this case there could not be an inquiry as [* 727] to that; for all the necessary parties were not before the Court; and therefore could not be concluded by any inquiry in this cause. The heir at law is not before the Court. The second son is a lunatic; and the interests of the daughter and her children

(1) 4 Bro. C. C. 80; *ante*, vol. i. 565; and the note, 567; *Roake v. Kidd*, *ante*, 647.

(2) 8 Term Rep. B. R. 379.

(3) *Anonymous*, 1 Salk. 153.

(4) 2 Ch. Ca. 115, 221.

cannot be provided for in this suit. It was decided in the Court of Chancery in *Rose v. Calland* (1), that, where there is a doubt on the title, though the Court is against that doubt, a purchaser shall not be compelled to take the title. The heir at law, the annuitants, and the widow, have been throughout treated as unnecessary parties.

Another objection respects the time, at which the agreement ought to have been completed. That the time is material is now clearly settled: *Lloyd v. Collett* (2): *Forrest v. Elwes* (3). It is a monstrous proposition, that, because the Defendant did not abandon the contract on the day, on which it ought to have been performed, not having delivered up again possession till a few days afterwards, he should now be held absolutely concluded thereby.

CHAMBRE, *Justice*. Supposing, there is an inflexible rule, that the Court cannot examine into the title in the first instance, but must wait for the Officer's report, that is a complete answer to the Defendant's case. But, supposing, there is no such rule absolutely inflexible, and there is an incurable defect of title, admitted on all hands, may not the Court dispose of the suit in the first instance; and is a purchaser to be compelled to take a title liable to such incumbrances as the annuity for the lunatic and the provision for the unborn children of the daughter, on any terms of indemnity whatever?

Mr. *Piggott*, in reply. I do not contend, that of necessity and invariably there must be a reference; admitting, that, where it has incontestably appeared to the Court, either in the first instance, or after a reference, that a title such as a purchaser ought to be compelled to take, cannot be made to him, such a decree as has been made in this cause is proper. But, where the objections are such as are of course to be referred, namely, such as may be removed, as in this case by providing for the incumbrances, or procuring [* 728] the concurrence of all parties, whom such officer, to whom the reference is made, shall find necessary for the security of the purchaser, such a decree is contrary to all experience, and the practice of all Courts of Equity.

The objections raised on these pleadings, and to these alone the Court can attend, are such as constantly, not occasionally and in a few instances only, but in daily practice are referred to the examination of the appropriate officer. Though the lunatic as such cannot join in the conveyance, the Court would not hesitate on account of so small a charge, of a temporary nature, to compel performance of the contract; for the Court may, and is in the constant practice of so doing, direct a competent part of the purchase-money to be invested to secure the due payment of the charge; and the same may be done with respect to the daughter and her children; if there shall be any. Courts of Equity are in the constant habit of compelling

(1) *Ante*, 186.

(2) 4 Bro. C. C. 469; *ante*, vol. iv. 689.

(3) *Ante*, vol. iv. 492. See other cases referred to, *post*, in a note to the judgment, 737.

purchasers to take much more objectionable indemnities ; where the incumbrances are small and of a temporary nature.

With respect to the objection, that the personal estate of the surrenderor was to be first applied, it is to be observed, that the trustees had nothing to do with that. It was not assigned over to them by the deed. They could not meddle with it in any manner. Not a word is said about it in the answer ; and the circumstances clearly point out a case of perfect insolvency : the surrenderor parting with the whole of his property ; reserving only a small annuity to himself and the several branches of his family. This is a deed of trust for the benefit of creditors ; and because the trust authorizes either a mortgage or a sale, it is contended, that the trustees had no power over the whole fee ; and that having made a mortgage they were not at liberty to raise a farther sum for the purpose of the trust by a sale ; the debts being unpaid. That objection does not seem to make much impression.

No laches is imputable to the Plaintiff : the bill being filed two months after the 1st of May, the time, when the contract was to have been performed : the Defendant having about that time set up the intrusion of a third person without any title upon the premises, as the ground of his refusing to complete his contract ; which is no fair objection. The answer does not say that the deed is **functum officio* by the payment of the debts ; that the [* 729] heir entered upon him ; and therefore he could have no possession : but upon that entry the purchaser calls for an abstract of the title ; and then takes the objections I have stated, and the others founded, upon the charges for the lunatic, the daughter, and the widow ; all which are the subject of inquiry and arrangement ; incumbrances, that may be removed or satisfied. Farther, upon looking into the trust-deed it will be found, that these annuities are only charged till the time, when the estate should be sold by the trustees ; and the interest of the mortgage and debts are in the first place to be paid out of the rents, before these annuities are to attach upon them. As these are the only objections appearing on the answer, the conclusion is, that upon the inquiry made by the purchaser, after the heir entered upon him, he was satisfied, such entry was without title.

With respect to the time and the delay, if the purchaser after this inquiry had answered, and submitted to complete his purchase on a good title being made to him, the reference might have been immediately made, and the business settled. As to the want of parties, if there was any doubt in that respect, such reference would also have settled that ; and till such reference it could not appear, that the heir might not have become sensible of his mistake and willing to join. Supposing it necessary for him to join, a Court of Equity would not dismiss the bill, but would either direct a reference on that point, or in the first instance let the cause stand over for the purpose of making the heir a party. By affirming the decree great injustice will be done to the creditors. It cannot be said, they are not enti-

bled to have this contract performed. If the heir would join, and against him unquestionably they could compel a sale, there can be no difficulty. With respect to the charge for the children, if there should be sufficient after payment of the debts, to which it is postponed, a sum might be laid out in the funds, or left in the hands of the purchaser; or it might be the subject of any other arrangement in the Office upon a reference.

The cases cited with respect to the time are all cases of great laches, and every case, except *Rose v. Calland*, came on after a reference. In that case there was a palpable blot, and nothing to be

referred: yet the Lord Chancellor was at first not disposed to [* 730] make the decree without a reference; and only * yesterday in

The Marquis of Hertford v. Boore (1), though a case of considerable laches, and there were great difficulties as to the title, the Lord Chancellor would not enter into them; but directed a reference; which by no means infers, that the Court will decree against the Defendant, and force the title upon him if afterwards it remains doubtful.

The Defendant proposed to read evidence as to the non-delivery of possession according to the terms of the parol agreement set up by the answer: which was objected to by CHAMBRE, Justice.

It was said for the Defendant, that evidence may be read, where the parol agreement is not inconsistent with the written agreement. This is to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement: namely, delivery of possession according to the custom of the country.

GRAHAM, Baron. The parol agreement can only be admitted, where the written agreement is not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. My Brother Chambre has expressed his opinion; and I entirely agree with him, that the parol cannot be made to form part of the written agreement.

Feb. 14th. CHAMBRE, Justice, stated the case: and delivered his opinion:

The question upon this appeal from the decree of the Vice Chancellor turns principally upon the surrender, made by Lawrence Taylor, dated the 1st of November, 1788. Under that surrender the trustees did not proceed immediately either to sell or mortgage: but in 1790 they adopted a mode of raising money by mortgage, at least in part. There is some doubt upon the evidence, whether they did so altogether, or not; for in the account in evidence it seems, as if they had sold some parts before. The mortgage in 1790 was made for 1700*l.* It was not confined to these premises:

[* 731] but it comprises the whole of them. Lawrence * Taylor

died in 1797; and soon after his death the contract was made between the Plaintiff, then the surviving trustee, and the Defendant for 1680*l.*, to be paid on or before the 1st of May next after the execution of a good title to the premises. The Defendant alleges, that at the same time it was agreed, though not put into writing, that he was to be let into possession at the usual times in that country: namely, as to the meadow, on the 2d of February, the arable and pasture, the 25th of March; and the housing and buildings, the first of May. If that agreement was made at the same time, it ought to have been put into writing: but, as it is not put into writing, we cannot in this suit take it into our consideration, as the pleadings are drawn. It is not very material. The premises were in possession of several tenants, and part was in the possession of Lawrence Taylor's widow. After some time, the precise time does not appear, the Defendant possessed himself of the land the widow possessed, but not of the mansion-house. The lands, of which he took possession, comprised about three sevenths of the whole. He did several acts as owner, upon the supposition of having a complete title. He received the abstract in March; and took objections: but it does not seem, that he was deterred by the abstract from considering himself as owner; for he continued in possession till about May. It is said, he required the abstract in consequence of the son's conduct; who got into the house along with his mother; and insisted on retaining possession of that and some other premises.

Against this decree it was said, there is an invariable rule, that the Court ought not to decide upon the validity of the title, whether it is such as a purchaser ought to accept, in the first instance: but the title ought to be sent to the Master, or the officer of the Court; and should be taken into consideration by the Court upon his Report. If there were an inflexible rule of that sort, it would dispose of the case. But if no authority had been cited, I should find it very difficult to accede to that idea, that there should be such an inflexible rule; for if it should clearly appear to the Court upon the pleadings and the evidence, that there are objections, not to be removed, it would be an idle and unnecessary expense to the parties, to answer no purpose, to make such a reference. We are however relieved from any difficulty *from the circumstance of a [* 732] very recent and decided authority (1) by the Lord Chancellor.

The first objection made to this title is, that the trustees have been bound by adopting the power given them of mortgaging in 1790; either as an election; or, that it raises a presumption, that there was no necessity for a sale; and upon the whole instrument they were not to sell, unless it was necessary. By the mere act of mortgaging I cannot think, the trustees have at all bound themselves. Various persons were to have the benefit of the trust: creditors, and

(1) *Rose v. Calland*, *ante*, 186.

the relations of the surrenderor, having interests by the deed declaring the trust. It would be strange to say, that, the trustees having by mortgage raised a sum insufficient, the trust must remain unexecuted, and proceed no farther. There is no weight therefore in that objection.

Another objection is, that the possession was not delivered at the time stipulated by the contract. It may be material to consider that hereafter: but upon this simple fact, connected with the others, I think, there is nothing in it. There was not much stress laid upon it by the Defendant. Time is frequently very material: but it would be monstrous to say, the act of a mere trespasser, the mere interposition of Lawrence Taylor as a trespasser, alone should defeat the contract. A compensation might very easily be made, when the estate should be recovered, for any disadvantage from not having possession precisely at the day. But the objection goes a little deeper than that; and we ought to look at the nature of the trusts. The heir gained a very considerable interest in the execution of the trust; for by the declaration of the trusts he is to have the benefit of the surplus; and when the trusts should be fully executed, if any part of the estates remained unsold, those were to be conveyed to him. It was stated in the argument, that the trustee rested ten years after the mortgage. That is not exactly true; but he did rest a considerable time, till after the death of Lawrence Taylor, the surrenderor: who lived till 1797. Soon after his death the trustee proceeded to execute his trust more fully by contracting for the sale of the estates. Certainly it was of great importance to the son to have it ascertained, and in such a way that no purchaser could doubt of it, that the trust had not been fully executed, when the contract for sale was made. Therefore he at least ought to have been a party. He was a very material party. In that respect the proceedings were extremely defective; and if the case went no farther, it cannot be said, that in that situation the Plaintiff was entitled to any decree at that time for a specific performance. Therefore it was necessary either to dismiss the bill for want of parties, or to put it in some way, so that he might be brought before the Court. But I am afraid, the objections to this title do not rest here: but this is an extremely powerful objection, and in the article of time. I do not lay much stress upon the possession taken by the heir. I lay as little on the assertion, that the estate has since been recovered back from the heir by ejectment. It must necessarily be recovered, if an ejectment was brought; for he had no legal right. He had only an equitable title. But how long was the purchaser to remain out of possession; while disputes, which might be of so extensive a nature, between the heir and the trustee, might continue? I do not know, that it could be settled in two years. It certainly might occupy a very considerable time: and would be a pretty strong obstacle to a specific performance.

But it does not rest upon this objection only. There are

others of greater weight ; which cannot be removed. How are you to dispose of the interests given to the lunatic and the unborn children of the daughter ? It is said, a sufficient sum of money might be invested to secure the sum given to the daughter Mary for life, and afterwards to her children ; and also a sufficient sum to answer the interest of the lunatic. In what manner is that to be done ? Is the purchaser of an estate, who was the entire owner of his money before the contract, to take the estate encumbered with this trust ? Who is to be his trustee ? It must be in some person's name. That person may sell it out. Is he bound to be responsible for the act of any person, and to suffer by any misdemeanor of his ? Again, what difficulties may arise with regard to the application of this money, in which the lunatic is interested ! Is the purchaser to take upon himself the burthen of looking to the execution of the trust, so far as respects the lunatic ? The money might be invested : but the purchaser would in the same way be responsible for the acts of the trustee. If it should be said, that possibly before the officer of the Court it might be proposed to * obviate this [* 734] by agreeing, that the purchaser should keep a sufficient sum of money for these purposes in his own hands, that would remove his responsibility for another person : but still he would be left encumbered with trusts ; which will not expire till some persons unborn come *in esse*, and attain the age of twenty-one ; encumbered also with the proper application of the money, not only for the lunatic, but for the infants, till the youngest attains that age. No man, that contracts for the purchase of an estate, can be subject to such incumbrances, of which he has no notice, and does not mean to take upon himself such trusts. There would be a necessity for another suit in equity ; in order to have this money invested ; so as to put the money and the interests of the parties under the protection of the Court. Granting a specific performance is not to be claimed as matter of right. It is in the discretion of the Court ; and will not be done, unless complete justice can be done by the party seeking it (1). There is no right in the vendor in this case to go to law for damages for a breach of the contract. There is a good title implied perhaps in every contract : but here the completion of the title being by the terms of the contract fixed for the 1st of May is a condition precedent. He comes into equity under such circumstances, that, giving him the advantage of every person interested coming in and concurring to make a good title, still it appears upon the whole proceedings, that some objections are of a nature, that could not be removed (a).

Under these circumstances therefore I am of opinion, that a title

(1) See, *ante*, *Calverley v. Williams*, *Calcraft v. Roebuck*, vol. i. 210, 221, and the note, 226 ; *post*, *Emery v. Wase*, 846 ; viii. 505 ; *White v. Damon*, vii. 30 ; ix. 606 ; *Mortlock v. Buller*, x. 292 ; *Mason v. Armitage*, xiii. 25 ; *Hill v. Buckley*, xvii. 394 ; xviii. 111 ; *Howell v. George*, 1 Madd. 1 ; *Martin v. Mitchell*, 2 Jac. & Walk. 413.

(a) See *Marquis of Hertford v. Boore*, *Aston v. Boore*, *ante*, 719, note (a), and cases cited.

cannot be made to the purchaser, but at a considerable distance of time, and with the aid of other parties; and that the purchaser would be kept out of possession a considerable time: that therefore it was quite unnecessary to send this to the officer of the Court; and the decree is proper; and ought to be affirmed.

GRAHAM, *Baron*. I perfectly concur in the opinion, and adopt the reasons, that have been delivered: but as the course of this Court is, that our opinions are to be carried to the Chancellor, who makes the decree, I shall very shortly explain my reasons for thinking, the decree below is perfectly right. This is not the common case of either a devise or a surrender for the purpose of raising money either by sale or mortgage. It is probable, a sale

[* 735] * was thought in the first instance necessary: if so, it looks as if the parties thought, that sale should be immediate; for it is directed to be with all convenient speed. Probably it was meant to take place even in the life of the surrenderor: but if the trustees choose not to sell but to raise money by mortgage, then it goes on to provide for the payment of the debts and all these charges; and then concludes with a direction, when the trusts shall be fully satisfied, to surrender the premises remaining unsold to the son and his heirs. These provisions are so made as to leave it very doubtful, whether the trustee having chosen the mode of a mortgage and a partial sale can now of his own authority execute those trusts; and of that I have great doubt. I do not mean to say, whether the creditors must thereby lose the benefit of the trust; or, whether the trusts do not devolve upon a Court of Equity.

But, supposing there was no doubt upon the construction, can it be contended, that very reasonable doubts do not now arise with regard to the propriety or necessity of a sale at all? What sums of money have been applied from the personal estate? What sums have been raised by mortgage? What was the extent of the debts; and what has been the conduct of the trustees? These are very natural questions requiring solution, and a judicial investigation, why this man should now proceed to a sale: which was not deemed necessary in the whole life of the surrenderor. Add to this the conduct of the heir, insisting upon his title. I agree, his intrusion is of no consequence. Learning the resistance of the heir the purchaser laid it before Counsel; who thought, the power of sale was gone. Nothing was done to remove the objection; which was very broadly and fairly stated. That the heir is entitled to something is very clear: namely, the surplus, after all the trusts are satisfied. No steps were taken to satisfy the purchaser: but a bill in equity was filed. Is that the way to treat a purchaser? He finds, he has bought a law-suit; for if the heir resists, it is impossible, that any thing can be done without calling the trustee to an account. His conduct has thrown the affairs of this trust into such a situation, that none but the creditors can call for a sale. It is impossible to say, such a suit is not now become necessary. Then they institute a suit perfectly defective. What is the effect of sending it to

the Master; when we see, the title can only be good, if the heir and other persons join? There would be a very considerable lapse of time to make the heir at law a party. Then after a very expensive litigation and two or three years' delay the purchaser might have his title cleared, and his costs; which do not repay him one half the expense he has incurred. Can a Court of Equity say that? How can it be done out of Court? No one is competent to treat with this lunatic. The purchaser must in the first place have taken out a Commission of lunacy: he is not competent to act for the lunatic or the infants. It is impossible therefore, that these affairs could be cleared up till a long period elapsed. He could not compel the widow to take this provision instead of dower. It was not to be settled in any way but by a suit in equity; which the Defendant did not mean to buy.

Mr. Hall quoted a case (1) before the House of Lords to this effect. An estate was limited to trustees for the payment of debts and legacies. The trustees raised the money; but instead of applying it according to the trust converted it to their own use; and it was resolved, that the heir should have the land discharged; and the legatees, as it is expressed, but that, I take it, must mean the creditors as well as the legatees, should take their remedy against the trustees. I thought it a very strong position: but I find, that Chief Baron Comyns in his very accurate Digest has it; and when I compare it with other cases, as powers over land, or any particular charge, or an equitable mortgage, where the estate has once borne the burthen, it is discharged in the hands of the heir; and creditors are in no better condition in that respect than legatees: the estate having borne the burthen once for all must not bear it again.

There have been several cases, where the Court has had no sort of difficulty in saying, they will not keep an unwilling purchaser or vendor before the Court. The Court had been formerly for some time very loose upon this; and there was one case before Lord Thurlow, from which my opinion revolts: but in *Whittaker v. Whittaker* (2) it appears, that Lord Kenyon upon the bill of the vendor either to have the contract completed, or to be released from it, recalled the true rule; holding, that the vendor was not to wait the arrangement of the testator's affairs; and directing the contract to be delivered up.

* In *Lloyd v. Collett* (3) I was Counsel for the Defendant; [* 737] and upon the motion for the injunction to restrain his action for the deposit we gave our reasons; that they had not even given an abstract; and only filed their bill on the 16th of November; though the contract was to have been completed on the

(1) Anon. 1 Salk. 153.

(2) 4 Bro. C. C. 31.

(3) 4 Bro. C. C. 469; *ante*, vol. iv. 689; see the note, 691; *The Marquis of Hertford v. Boore*, *ante*, 719; *Forrest v. Elwes*, *Spurrier v. Hancock*, *Harrington v. Wheeler*, iv. 492, 667, 686; *Guest v. Homfray*, *post*, 818; *Fordyce v. Ford*, 4 Bro. C. C. 494.

25th of March preceding. We also gave some evidence to show, the Defendant would be a loser by enforcing the contract at that time. But the Lord Chancellor asked, whether there was any instance of sustaining a contract, where no step had been taken by one party, and the other had, immediately, when the time was elapsed, insisted upon his deposit, and refused to be bound; and he refused the motion; holding, that if the time is totally neglected, the contract cannot be insisted on.

Upon these grounds therefore it is impossible in this case to make a decree for a specific performance; which would tie up this Defendant for years (1).

Costs were pressed for by the Defendant, but refused; on the ground, that it is very much the common course of the Court to consider, that there must be a reference to the Master.

1. THAT upon a bill brought for specific performance, where the Court perceives the defects of the title to be incurable, a reference to the Master (which, as to that point, would be an idle expense,) will not be directed; but the Court will itself, and at once, decide upon such invalidity; see, *ante*, note 6 to *Cooper v. Denne*, 1 V. 565.

2. As to the danger of admitting parol evidence in support of an application to obtain specific performance of an agreement; see note 3 to *Calverley v. Williams*, 1 V. 210: the note to *Hare v. Shearwood*, 1 V. 241: and note 2 to *Brodie v. St. Paul*, 1 V. 326.

3. That where time has not been made of the essence of a contract, relief may be given, although the condition as to time has not been strictly attended to; see note 2 to *Eaton v. Lyon*, 3 V. 690; and the note to *The Marquis of Hertford v. Boore*, 5 V. 719.

4. With respect to the title which a purchaser may insist upon before he completes his contract for purchase; see notes 2, 3, 4, 5, 6 and 8 to *Cooper v. Denne*, 565; but that by prematurely exercising acts of ownership, he may preclude himself from his ordinary equitable right of examining the title of the estate he has contracted for; see note 2 to *Calcraft v. Roebuck*, 1 V. 221; and that Courts of Equity reserve to themselves a discretion as to giving or refusing their aid to enforce specific performance of agreements; see notes to *Brodie v. St. Paul*, 1 V. 236.

5. It should be particularly observed, that some of the *dicta* in the principal case have been repudiated by Lord Eldon: his Lordship said, it would not be wholesome, if the doubts which the principal case expressed, as to what trustees for payment of debts could do, should remain as an authority: for it would go to shake the long settled doctrine, that trustees for payment of debts generally, can make a good title to a purchaser, who is not bound to look to any specific dispositions, subsequently directed by the deed or will creating the trust. *Jenkins v. Hiles*, 6 Ves. 654; and see *Smith v. Guyon*, 1 Brown, 185; *Rogers v. Skillicorne*, Amb. 189; *Williamson v. Curtis*, 3 Brown, 95; *Balfour v. Welland*, 16 Ves. 156.

6. The rule sometimes alleged, that a rehearing ought not to be reheard, is at any rate not a general one; see, *post*, note 5 to *Waldo v. Caley*, 16 V. 205.

(1) See as to this case *Jenkins v. Hills*, *post*, vol. vi. 646, and the note, 654; Sug. Vend. & Pur. 5th edit. 437, n. (1), 443.

LADY ELIBANK v. MONTOLIEU.

[1799, APRIL 16, 19; 1801, FEB. 19.]

UPON the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain; (a) but that the Plaintiff's share was subject to a farther provision in favor of her and her children; the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children; regard being had to the extent of her fortune and the settlement already made upon her.

IN 1795 Lady Cranstown died intestate; possessed of large personal property; leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband, Lord Elibank and against Montolieu; praying an account of the Plaintiff's share, and that it may *be [* 738] settled on her and her family.

The Defendant Montolieu by his answer claimed to retain Lady Elibank's share towards satisfaction of the debt due to him from Lord Elibank by two bonds; one dated the 31st of May, 1783, for 12,217*l.* 9*s.* 9*d.*: the other, dated the 14th of November, 1794, for 1000*l.*; upon the ground of the provision made for the Plaintiff by the settlement previous to her marriage with the Defendant Lord Elibank in 1776. By that settlement the sums of 12,000*l.* and 5000*l.* New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease for Lady Elibank for life as a jointure and in lieu of dower or thirds; and after the decease of both in trust for the children. The sum of 4000*l.* New South Sea Annuities were settled in trust for her separate use for life, and after her death for her children; and 2000*l.* 5 per cent. Bank Annuities for her separate use for life, and after her death for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the intail of Lord Elibank's estate a power was reserved to charge 200*l.* a-year jointure, and 50*l.* a-year to each of his younger children, not exceeding in the whole 200*l.* a-year, under a condition, that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The Defendant Lord Elibank by his answer stated, that a former Lord Elibank did charge the full extent of that power.

(a) 2 Williams, Executors, (2d Am. ed.) 936. See *Ex parte O'Ferrall*, 1 Glyn & Jam. 347.

The *Solicitor General*, [Sir William Grant], and Mr. *Alexander* for the Plaintiff. The Plaintiff desires an account of the personal estate of Lady Cranstown; and that a provision may be made for her. The Defendant Montolieu insists, that is not to be done; because he is a creditor of her husband; contending, that this case is out of the usual rule, upon which the Court acts for a wife; and that there is no necessity to come to this Court: the fortune not being in Court nor under the control of the Court. In *Jewson v. Moulson* (1) Lord Hardwicke held, that is not a necessary ingredient to enable the Court to act upon the property: and that this Court would interfere to prevent the husband from [* 739] obtaining it through a Court of concurrent jurisdiction, *as the Ecclesiastical Court; because that Court cannot give the wife a remedy; though he doubted, where it could be got at without the aid of this Court, or a Court of concurrent jurisdiction; and he states, that the rule is as old as the time of King Charles the First; and cites a case from Tothill. There have been many instances of an injunction to restrain the husband from proceeding in the Ecclesiastical Court, refusing to make any provision for his wife; and that Court having no power to compel him (2). The cases upon this subject are collected in Mr. Cox's note to *Bosvil v. Brander* (3); and the result is, that, where the property is a subject of equitable cognizance, it is not material, whether the wife, or the husband, or his representatives or general assignees, come for the aid of the Court. A wife in the situation of this Plaintiff, therefore, may come to this Court for the purpose of having that, to which she is entitled, secured to her and her family, and part settled to her separate use. She is entitled to the same reference as was directed in *Worral v. Marlbar* and *Bushnan v. Pell* (4), for the purpose of receiving a proposal for a settlement. In *Wright v. Rutter* (5) the Master of the Rolls observes, that it is now determined, that an action will not lie

(1) 2 Atk. 417.

(2) *Mealis v. Mealis*, Hil. 1764. See the note, *ante*, 517, in *Blount v. Bestland*, *Stonehouse v. Stonehouse*, 1 Dick. 98.

(3) 1 P. Wms. 458. The distinction, upon which that case was decided in favor of the husband's assignees, and, as it seems, without giving the wife any part of the fund, that the assignees were not the Plaintiffs, has certainly not been attended to in the more recent authorities; and this farther observation arises upon that case; that it is questionable, whether it could afford a ground for the application of the principle, upon which that distinction rests: the subject being a mortgage; with respect to which it must be remembered, that, the estate being absolute at law, the mortgagee, whether as Defendant to a bill of redemption, or as Plaintiff in a bill of foreclosure, is forced into this Court by the Equity of the mortgagor.

The cases, that have occurred upon this point since those referred to by the notes of Mr. Cox and Mr. Sanders, are *Macaulay v. Philips*, *ante*, vol. iv. 15; as to the general assignees of the husband, *Burdon v. Dean*, *Onwell v. Probert*, *Brown v. Clerk*, and *Freeman v. Parsley*, ii. 607, and the note, 609, 680; iii. 166, 421; and as to a particular assignee for valuable consideration. *Like v. Beresford*, iii. 506; *Franco v. Franco*, iv. 515; and *Hill v. Atkinson*, there mentioned in a note, 530. *Elliott v. Cordell*, 5 Madd. 149.

(4) Mr. Cox's note, 1 P. Wms. 459.

(5) *Ante*, vol. 673; more fully stated in *Rutter v. Maclean*, iv. 531.

against the executor for property bequeathed to a married woman (1); and one of the reasons is, that the husband would get it free from the condition a Court of Equity interposes. It is not necessary therefore that the property should be in this Court, or in the hands of trustees; for if it was in the Ecclesiastical Court, or in the hands of an executor or an administrator, the interest of the wife is protected. *That case related to a residue of personal estate [* 740] in the hands of an administrator; for which it was not necessary to come here; but that was held not to make any difference. But suppose, the husband could sue at law, this Defendant could not make this defence; that he will not pay; but will keep this fund in satisfaction of the husband's debt to him; for it is clear, at law a creditor of the husband cannot set off the husband's debt against the demand of the husband and wife; and being entitled in her right he must sue with her. Still less should he be permitted to retain in Equity upon that ground; for where he is permitted to avail himself of the legal right, the right must be clear. There have been several other cases, in which the Court has acted upon a residue just as if the property was in the hands of trustees. The accident, that Montolieu is the administrator, cannot alter the right of the wife. In *Atherton v. Knowell* a husband, entitled in right of his wife to an income, being unable to maintain her, the Court referred it to the Master to see, what it would be proper to allow her out of that fund. *Sleech v. Thorington* (2); *Watkyns v. Watkyns*, there cited: *Milner v. Colmer* (3); *Oglander v. Baston* (4).

The only ground that can be taken against this bill, is, that Lord Elibank became the purchaser of what might in future accrue to Lady Elibank; but there is no stipulation of that sort in the settlement; nor any indication of that intention. On the contrary all the funds settled are her own; and a very scanty provision is made for her out of his estate. In *Burdon v. Blaster* in 1775, the husband having become a bankrupt the question arose between the assignees and the wife. The bill was filed by the assignees; and, though an objection was raised on account of the settlement, the wife obtained her Equity. In *Pawlet v. Delavel* (5) it is laid down (6), that though the Court will make a decree, where the husband and wife are parties, where the wife has a proper settlement, to pay to the husband and wife, where the wife has not had a sufficient settlement, the Court will not. As to the form of this suit, the wife sues alone, it is true, not with her husband: but that was the case in *Worrall v. Marlar*. If she has the Equity against her husband, she must be entitled to sue.

(1) *Deeks v. Strutt*, 5 Term Rep. B. R. 690.

(2) 2 Ves. 560; *ante*, vol. ii. 499.

(3) 2 P. Wms. 638.

(4) 1 Vern. 396.

(5) 2 Ves. 663.

(6) 2 Ves. 669.

The *Attorney General*, [Sir John Mitford], Mr. Mansfield, and Mr. W. Agar, for the Defendant Montolieu. The objection to the form of the suit would merely occasion delay; and a bill would be filed in their joint names.

There is no case, in which the Court has decreed against a trustee, who had paid the husband without suit, that the wife had an Equity to charge the trustee. The husband suing in the Ecclesiastical Court is suing persons unwilling to pay him; and the trustee or executor so sued has come into this Court to restrain him. That is quite a different case. Suppose the husband institutes a suit in the Ecclesiastical Court; and the trustee submits to pay: could the wife come here and say, it was in fraud of her Equity? Lord Hardwicke in *Jewson v. Moulson* supposes a case, where the husband can come at the property without the aid of the Court. All the instances are, where the person has refused to pay, unless compelled by a Court of Equity. That gives the jurisdiction; and none can be produced, where the executor has been prevented from paying to the husband, if he chose to do so; or where having paid to the husband he has been charged as upon a breach of duty by reason of that payment; and made to refund. The case of *Worrall v. Marlar* is a singular one; and was influenced by the insolvency of the husband: but this Plaintiff has a competent provision.

This case is certainly new in the circumstance, that the husband is debtor to the other Defendant: but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose, Lord Elibank had sued, and the Equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond Courts of Law as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband and the husband paying his debt out of that. *Burdon v. Blaster*, *Jewson v. Moulson*, and all the other cases, go upon the same ground: that the property was in the Court; and the husband or his assignees could not have it without the assistance of the Court. In this case [*742] the Plaintiff comes to get it from *the administrator contrary to the plainest Equity between him and her husband. There is no instance of a bill by the wife against her husband to have the property settled to her separate use; which is the object of this bill. This property, though subject to the Equity of the wife, is the property of the husband: *Packer v. Wyndham* (1).

The *Solicitor General*, [Sir William Grant], in reply. *Packer v. Wyndham* has nothing to do with this case. The wife being dead, and without issue, the question arose between the assignees of Mr. Packer and the next of kin of Mrs. Packer; and it was insisted,

that, if the agreement had been carried into execution, Mr. Packer would have been entitled to the money; and she having been provided for during her life, and being dead, and not having left any children, the purpose, for which the Court laid its hand upon the property, to secure a settlement, was at an end. The rule is clearly laid down in *March v. Head* (1); and it is now a settled rule, that if a husband in right of his wife becomes entitled to any sum, exceeding 200*l.* (2), this Court will not permit him to have it without a reference to the Master for the purpose of a settlement; unless the wife consents, that it shall be paid to her husband. The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent, that he shall have it, or he is under the necessity of making a settlement; unless the Master is of opinion, that the settlement already made by the husband is such as to answer all the purposes of the wife. *Packer v. Wyndham* is mentioned by Lord Hardwicke in *Bates v. Dandy* (3) as consisting of many particular circumstances. *Worrall v. Marlar* has determined, that the wife may file the bill by her next friend; and there can be no doubt, that this Plaintiff has an interest, that will enable her to file such a bill for the purpose of having her property ascertained. Lord Elibank is passive. It is true, if he had assigned this to Montolieu, that might have bound the Plaintiff: but he has not done so. This administrator stands in the character of trustee; and has no right to object merely for his own advantage. If this bill should be dismissed, the Defendant would not be discharged: but on the death of Lord Elibank the right would survive; and she might file a new bill. It is not like a release.

* If a proper settlement has not been made, there must [*743] be a proposal laid before the Court, as in *Worrall v. Marlar*. That must be made by the husband, not by Montolieu; who has no more right than any other creditor.

Lord CHANCELLOR [LOUGHBOROUGH]. I wish to consider this case

Feb. 19th. Lord CHANCELLOR [LOUGHBOROUGH]. The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the Plaintiff in this Court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion, the Defendant had no right to retain. The administrator is trustee for the next of kin: the Plaintiff being one of them, if she has any Equity against her husband with regard to this money, that Equity will clearly bar any right of retainer he can set up to the property, of which he became

(1) 8 Atk. 720.

(2) By a late rule of the Court the sum, for which the wife's consent is required, in order to give it to her husband, has been extended from 100*l.* to 200*l.* See *Elworthy v. Wickstead*, 1 Jac. & Walk. 69.

(3) 2 Atk. 207.

administrator. With respect to the only difficulty I had, upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the Defendant Montolieu had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would have been the Plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then upon all the circumstances it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her Equity upon the bill of the administrator, praying, that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her (a), for the provision upon her marriage was clearly not adequate to her fortune; and it is clear, that provision was made upon the expectation, that by circumstances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form; the bill coming on the part of the wife instead of the husband.

[* 744] * Declare, that the Defendant Montolieu is not entitled to retain in satisfaction of the debt due from the Defendant Lord Elibank to him; but that the distributive share of Lady Crans-town's fortune, accruing to the Plaintiff as one of her next of kin, is subject to a farther provision in favor of the Plaintiff and her children; the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the Plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her (1).

[THESE notes belong also to *Murray v. Lord Elibank*, 10 Ves. 84; 13 Ves. 1; 14 Ves. 496.]

1. Where property for the separate use of a *feme covert* is in question, a bill in respect thereof not only *may*, but *ought* to be brought in her behalf by her *prochein amy*; otherwise it would be her husband's bill; *Griffith v. Hood*, 2 Ves. Sen. 452; and see the note to *Lampert v. Lampert*, 1 V. 21.

2. Upon a reference to the Master to approve of a settlement upon a wife, out of a particular property, it is always usual to direct the Master to have regard to any previous settlement which the husband may have made upon the wife *aliunde*. *Green v. Otte*, 1 Sim. & Stu. 254.

3. After a reference to the Master, a *feme covert* may waive her equity to have a settlement, and thereby exclude the claims of her children; but if she die after a proposal for a settlement is directed, (or after she has filed a bill claiming that equity,) without waiving it, her children will have an immediate title to the provision which she herself might have acquired, had she lived; see note 2 to *Macaulay v. Phillips*, 4 V. 15.

4. That where the property of a married woman is of such a nature that her

(a) See 2 Story, Eq. Jur. § 1414, 1415, and cases in notes; *Burdon v. Dean*, ante, 2 V. 607, note (a); *Ball v. Montgomery*, ib. 191, note (d), and cases cited; *Blount v. Bestland*, ante, 517, note; 2 Williams, Executors, (2d Am. ed.) 1015, 1016.

(1) *Post*, *Murray v. Lord Elibank*, vol. x. 84; xiii. 1; xiv. 496; *Green v. Otte*, 1 Sim. & Stu. 250.

husband, or his assignees, can reach it by process of common law, Equity cannot interpose to make terms for the wife; and that this is one of the reasons why an action at law does not lie for a legacy; see note 1 to *Wright v. Rutter*, 2 V. 673; and the farther reference there given.

READE v. READE.

[1800, JULY 22, 23; 1801, FEB. 19.]

DEVISE in trust to dispose of the premises unto and amongst the devisee's four children in such manner, shares, &c. as he should by deed or will appoint: one dying in the life of his father, before appointment, was held entitled to a fourth; the father after that child's death having appointed three fourths to his three surviving children respectively. (a) (See note (2) page 750.)

Account of rents and profits confined to six years by analogy to the action for mesne profits, [p. 744.]

Power of appointment does not prevent the interest vesting, subject to be divested, [p. 748.]

Difference between land and money subject to a power of appointment, (b) [p. 749.]

PETER ROOKE by his will, dated the 13th of July, 1752, devised to his wife Beatrix certain estates, called Fryom Court Farm (except the wood growing thereon) discharged of a fee-farm rent issuing out of the same, and of an annuity of 16*l.* a year, payable to Mary Hibberd, for her life; and after her decease he gave to his brother-in-law George Reade all the said estate, with the woods, &c.; to hold to him, his heirs, &c., for ever; upon trust, that the said George Reade, his heirs or assigns, should sell, give, devise, or otherwise dispose of, all the said premises with the appurtenances unto and amongst his (said George Reade's) four children by his wife, the testator's sister Barbara, deceased, namely, George Garret Reade, William Reade, Barbara Reade, and Jane Reade, in such manner, and by such shares, and under such directions, as George Reade should by deed or will appoint.

The testator also devised other freehold estates to his nephew William Reade; and he gave his wife all his household goods and

(a) The point said to be decided in this case, though not easy to collect the fact, is, that where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects of the appointment in the life of the testator will, *pro tanto*, defeat the power and devise over, so that the power and devise will only remain as to the shares of the survivors. Sugden, Powers, (4th Lond. ed.) 470, and note (1). See also *ib.* ch. 9, § 10, p. 559-562; ch. 6, § 3, p. 400, 401; *Boyle v. Bishop of Peterborough*, 3 Bro. C. C. (Am. ed. 1844,) 243, 254, and notes; *S. C.*, ante, 1 V. 299, note (a); *Bristow v. Warde*, ante, 2 V. 336, note (a).

(b) The result of the authorities is said by Sugden, in his able work on Powers, to be, that the power of appointment does not prevent the vesting of the estates limited in default of appointment: and it is equally clear that the same doctrine applies to personalty; and that where money is absolutely given over in default of appointment, it is vested, subject to be divested by the execution of the power. Sugden, Powers, (4th Lond. ed.) ch. 2, § 4, p. 153.

other specific articles ; and directed that George Reade, his executors, &c., should as soon as conveniently might be after the decease of his wife out of the rents and profits of the estate, called Fryom Court Farm, devised to him, in the first place reimburse and pay all the testator's debts, funeral expenses, the fee-farm rent, the annuity to Mary Hibberd, and the legacy therein before given by the testator to his wife, and which his executor should have paid out of his personal estate thereafter devised ; so as his legatees

[* 745] * thereafter named might not be charged with the same ; and that George Reade should, after the payment aforesaid by and out of the rents, issues, and profits, of the estate called Fryom Court Farm, pay the residue of the rents and profits unto the said four children of his late sister Barbara, wife of George Reade, by half-yearly payments in and by such dividends, shares, and proportions, as George Reade should think fit to limit and appoint the payment thereof, and in like manner by the same ways and means as the testator had before directed the disposition of his estate, called Fryom Court Farm ; and all the residue of his goods, chattels, personal and other estate, whatsoever and wheresoever, not therein before by him given and devised, he gave and bequeathed to George Reade in trust for and for the equal benefit of his (George Reade's) three younger children, William, Barbara, and Jane, to be equally divided between them, share and share alike, as they should severally attain their ages of twenty-one years ; and the interest, proceeds, issues, and rents, of the same in the mean time to be applied towards their respective maintenance in such manner as their father should judge most for their advantage.

By a codicil, dated the 20th of March, 1761, he devised another real estate to his wife for life ; and after her decease to George Reade, in trust for him George Reade to sell, give, devise, or otherwise dispose of, in like manner as his other freehold lands were directed by his said will, for such uses and purposes as were directed by his said will, and to no other use whatsoever.

George Garret Reade, the eldest son of George Reade, died in the life of the testator ; who died in 1768. Jane Reade married Joseph Willis. By indentures of lease and release and appointment, dated in July 1769, reciting the will and codicil, and that George Garret Reade died long before the death of the testator ; and therefore George Reade was minded to appoint three fourth parts of said freehold estates unto his said three surviving children in equal shares, it was witnessed, that in pursuance of the trusts and powers vested in him by said will and codicil and in execution thereof he gave three undivided fourth parts of the said estates, to William Reade, Jane Willis, and Barbara Reade, their heirs and assigns, equally to be divided between them as tenants in common.

[* 746] * By indentures, dated the 1st of August, 1769, and a fine, the said three fourths of the said estates were settled, as to one fourth, to the use of William Reade for life ; remainder to trustees to preserve contingent remainders ; remainder to his first

and other sons in tail; remainder to his daughters in tail, with cross remainders; remainder to Jane Willis, Barbara Reade and George Reade, the son of George Garret Reade, or any or either of them, or any issue of them, in such parts and for such estates as William Reade should appoint, and in default thereof, to them and the heirs of their bodies, with cross remainders in tail; remainder to William Reade and his heirs; and as to the other two fourths, to the use of Joseph and Jane Willis and Barbara Reade respectively, with similar limitations to their sons and daughters, and remainders, including George Reade, the son of George Garret Reade deceased.

The testator's widow died in 1771. George Reade, son of George Garret Reade, was then of the age of nineteen. He died in September 1775, intestate; leaving George Reade, born in May 1775, his only son and heir at law, and also heir of his great-grandfather, and of Jane Willis and Barbara Reade; who died, the former in 1777, the latter in 1779, without issue; no appointment having been made under the settlement as to their fourth parts. Joseph Willis died before his wife.

The bill was filed in July 1797, by George Reade, (the great-grandson of George Reade, the devisee in trust,) who attained the age of twenty-one in May 1796, against William Reade, executor of his father George Reade, the devisee in trust; suggesting possession by the Defendant and his father ever since the death of the testator's widow; and praying a discovery, and an injunction to restrain the Defendant from setting up any outstanding terms for the purpose of defeating an ejectment.

The Defendant by his answer not setting up any title, except under the will and codicil and the said indentures, the Plaintiff claiming the fourth part of the estates, that was not appointed by his great-grandfather, and his proportion under the settlement of Jane Willis's and Barbara Reade's fourths, making in the whole two fourths of the estates, brought an ejectment in 1798; and obtained a verdict for two fourths; subject to the opinion of the *Court of King's Bench as to the fourth, which was left [* 747] unappointed; and upon argument of that question on the case reserved the Court were of opinion, that the Plaintiff was entitled to that fourth, and judgment was entered up accordingly. (1)

Upon that judgment a supplemental bill was filed for an account of the rents and profits, received by the Plaintiff's great-grandfather and by the Defendant since his death, and for a partition. The Defendant by his answer submitted, whether the Plaintiff became entitled otherwise than legally to the fourth part, of which there was no appointment; and whether the Defendant as survivor of the four children of George Reade did not become beneficially entitled to that part; and that the opinion of the Court of King's Bench having been, upon the admission, that the Plaintiff is heir at law of

(1) See the Report, 8 Term Rep. B. R. 118.

Peter Rooke, the testator, and of George Reade, the Plaintiff's great-grandfather, and of George Garret Reade, that the legal title to the two fourths of the estates was in the Plaintiff, the verdict and opinion of the Court are not conclusive in this Court as to the question, whether the Defendant is not beneficially entitled to the unappointed fourth. The answer also insisted, that, as the Plaintiff's great-grandfather was not in possession of any part of the premises, subsequent to the death of the testator's widow, the Plaintiff has no claim upon his personal assets in respect of the rents; and he submitted to account from the deaths of Jane Willis and Barbara Reade respectively.

The *Attorney General*, [Sir John Mitford], and Mr. Hall, for the Plaintiff. The case of *Maddison v. Andrew* (1) as to this point has been impeached in *Witts v. Boddington* (2) and other cases by Lord Thurlow; who said it was impossible to infer a joint-tenancy, where the testator meant division. In *Trundell v. Eames* (3) Lord Bathurst upon the word "amongst" held it a tenancy in common. (a) The direction in this will is to give unto and amongst the four children. Nothing is given expressly in default of appointment: but a gift is to be raised by implication; and if so, it must be a gift of the same description. The trust was only as to the shares, a power of division

in the father. If the four children had survived, he could
[* 748] *not have excluded any one. The result is, they must take as tenants in common, and not as joint-tenants.

Upon the Defendant's construction it must be contended, that if all the children had survived the father, and he had died without an appointment, they could take nothing: but that is not the way, in which the Court construes these powers. The Court makes an equal distribution, because they have not the discretion the trustee had to make an unequal distribution. Can this gift to the four children in such proportions as the father thinks fit be said to be a gift to a less number than four, or not to be a gift to any of them? They are all tenants in common in the proportions the father shall name; and if he does not name the proportions, then they must take equally. In this case the subject is real estate, given to be divided among the children; one of whom was heir at law; and the rents and profits, subject to certain charges, are to be divided as well as the estate. Therefore it must vest in some way at the death of the testator; and there is a great difference between this and *Maddison v. Andrew*; where the wife was residuary legatee; and it was considered only

(1) 1 Ves. 57.

(2) 3 Bro. C. C. 95: stated from the Register's Book, ante, 503, in *Brown v. Higgs*.

(3) Before Lord Bathurst, 11th February, 1773: stated from the Register's Book, 4 Bro. C. C. 17, in *Campbell v. Campbell*.

(a) As to the creation of tenancies in common and the favor shown to the construction of them, see *Campbell v. Campbell*, 4 Bro. C. C. (Am. ed. 1844,) 15-19, and notes; *Joliffe v. East*, 3 ib. 27, note (a); *Stratton v. Best*, 2 ib. 240, note (a); *Drayton v. Drayton*, 1 Desaus. 329; *Bunch v. Hurst*, 3 Desaus. 288; *Westcote v. Cady*, 5 Johns. Ch. 334.

as a direction to her, in what manner she should dispose of the 600*l.*, part of the residue, and which she was not bound to dispose of till her death: so that she might retain the interest in the mean time. According to the modern cases the interest there would have been considered as vesting, subject to be divested. In a note of that case by Mr. Joddrel Lord Hardwicke appears to put the joint-tenancy quite out of the case.

Mr. *Mansfield* and Mr. *Johnson*, for the Defendant, relied on *Maddison v. Andrew*.

LORD CHANCELLOR [LOUGHBOROUGH]. *Maddison v. Andrew* is generally cited as a case of a fraudulent appointment; being to a dead child. The argument upon this point was not necessary to the decision. I have a note of that case; which I believe was taken by the present Lord Pery; who was then at the bar. That note also represents Lord Hardwicke to have been clearly of opinion, that it was not vested. That I doubt; for certainly upon the modern cases it would be considered vested, subject to be divested (1).

* Lord Hardwicke in the note I have says, he knows no [*749] case, where the interest has been held vested, where the sum is not certain; that therefore it was contingent; that it was insisted to be vested, subject to be divested; but it would not bear that construction; for it is given to the mother to be by her disposed of among the daughters.

There is a material difference between land and money. As to money, any part, that fails, of course falls into the residue. Then, where the sum is separated from the bulk of the personal estate, it would be a forced construction to throw that back into the general residue. But as to land, there must be an estate given; the intention to give is not sufficient. In *Marryat v. Townley* (2) the express joint-tenancy was controlled: Lord Hardwicke held, it was all blunder: it was impossible it could mean a joint-tenancy; as the conveyance was to be at the respective ages of twenty-one; and there was an evident intention of division.

I have not fully made up my mind upon this case: but I am inclined to think, George Reade was well advised at the time he made that deed.

Feb. 19th. LORD CHANCELLOR [LOUGHBOROUGH]. In this cause my opinion is, that the execution of the power by George Reade, the great-grandfather of the Plaintiff, was good, under the circumstance, that had taken place, of the death of his eldest son, who in the will was one of the four objects of appointment, and who died in the life of his father, before any appointment. Under those circumstances, I conceive, the father well and properly executed his power by

(1) See, *ante*, *Smith v. Lord Camelford*, vol. ii. 698; where this point was so held after great consideration by the Lord Chancellor. See also Mr. Justice Buller's opinion to the same effect, vol. iii. 661, in the judgment in *Goodtitle v. Otway*; *Cox v. Chamberlain*, iv. 631, and the notes, i. 309; ii. 706.

(2) 1 Ves. 102.

appointing only three fourths to his three surviving children. I do not find, that the Court of King's Bench had determined the precise question. I rather think, that was the opinion of the Court; though they would not put it so, and would not go farther than the legal title.

The Plaintiff therefore is entitled to two fourths: but the account of the rents and profits cannot go beyond six years (1). As to that the bill prays too largely. You cannot recover more than six years' mesne profits at law. My idea in giving you the two [* 750] * fourths is, that you are legally entitled: then the circumstance of being obliged to sue in Equity does not alter the nature of the action for mesne profits. He must have the costs of the bill (2).

1. WHERE interests are given by will so as to vest, in a qualified manner, immediately, though liable to be divested; there unless the specified contingency arise, or the power of appointment, which might divest the given interests, be exercised, those interests must continue vested, and will pass to representatives; see, *ante*, note 3 to *Malin v. Keighley*, 2 V. 333, and note 3 to *Smith v. Lord Camelford*, 2 V. 698.

2. The death of one of the class to whom a power of appointment extends, does not absolutely prevent an appointment of the whole subject amongst the survivors, even in cases where no power of exclusion was given; see note 1 to *Boyle v. The Bishop of Peterborough*, 1 V. 299.

3. That an account of rents and profits is usually limited to six years, by analogy to legal limitations, was the rule laid down in *Stackhouse v. Barnston*, 10 Ves. 469, as well as in the principal case; but in cases of trust, or detention of dower, or on other special grounds, the account may be decreed from the time the title accrued. *Dormer v. Fortescue*, 3 Atk. 130; *Pulteney v. Warren*, 6 Ves. 94; and see note 15 to *The Attorney General v. Bowyer*, 3 V. 714, with note 4 to *Pettitward v. Prescott*, 7 V. 541.

(1) *Ante*, *Drummond v. The Duke of St. Albans*, 433, [and notes], and the note, 439.

(2) This decision, as far as it leaves one fourth to the deceased child, is questioned by Lord Eldon, 1 Ves. & Bea. 92, *Butcher v. Butcher*. For the various questions and authorities on the subject of powers of appointment, see *Boyle v. The Bishop of Peterborough*, 3 Bro. C. C. 243; *ante*, vol. i. 299; *Bristow v. Warde*, *Wilson v. Piggott*, *Routledge v. Dorrill*, *Whistler v. Webster*, *Smith v. Lord Camelford*, ii. 336, 351, 357, 367, 698; *Crompe v. Barrow*, *Vanderzee v. Aclom*, iv. 681, 771; *Wollen v. Tanner*, *Spencer v. Spencer*, *Long v. Long*, *Fortescue v. Gregor*, *ante*, 218, 362, 445, 553; *Kemp v. Kemp*, *post*, 849; and the note, *ante*, i. 310.

SOMERVILLE v. LORD SOMERVILLE.
BAYNTUN v. LORD SOMERVILLE.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1801, JAN. 24, 26, 27; FEB. 23.]

THE succession to the personal estate of an intestate is regulated by the law of that place, which was his domicile at the time of his death. For that purpose there can be but one domicile; and the *Lex loci rei sitæ* does not prevail. (a) The mere place of birth or death does not constitute the domicile. (b) The domicile of origin, which arises from birth and connections, remains, until clearly abandoned and another taken, (c) [p. 750.] In the case of Lord Somerville, of two acknowledged domiciles, the family seat in Scotland, and a leasehold house in London, upon the circumstance the former, which was the original domicile, prevailed, (d) [p. 750.] A man may have two domiciles for some purposes, (e) [p. 786.]

(a) See note (a), to *Bempde v. Johnstone*, *Graham v. Johnstone*, *ante*, 3 V. 198; 2 Kent, (5th ed.) 429, 430, 431, and notes; Story, *Confli. Laws*, § 481, and numerous cases cited in note (1); 2 Williams, *Executors*, (2d Am. ed.) 1084, *et seq.*, and notes.

(b) See *Harvard College v. Gore*, 5 Pick. 372, 373. Two things must concur to constitute a domicile: first, residence; and secondly, the intention of making it the home of the party. *Harvard College v. Gore*, 5 Pick. 374.

Story, *Confli. Laws*, § 44; *Jennison v. Hapgood*, 10 Pick. 77; *Hallowell v. Saco*, 5 Greenl. 143; *Casey's case*, 1 Ashmead, 126; actual residence is not indispensable to retain a domicile, once acquired. It is retained by the mere intention not to change it. *Ib*; *Sackett's case*, 1 Mass. 58; *Abington v. Boston*, 4 Mass. 312; *Granby v. Amherst*, 7 Mass. 1; *Lincoln v. Hapgood*, 11 Mass. 350; *Sears v. City of Boston*, 1 Metcalf, 250.

(c) Story, *Confli. Laws*, § 46; *Harvard College v. Gore*, 5 Pick. 374. Every person has a domicile of origin, which he retains until he acquires another, and the one thus acquired is in like manner retained. *Abington v. North Bridgewater*, 23 Pick. 170; *Thorndike v. City of Boston*, 1 Metcalf, 242; *Kilburn v. Bennett*, 3 Metcalf, 199; *Jennison v. Hapgood*, 10 Pick. 77; *Wayne v. Green*, 357; *Moore v. Wilkins*, 10 N. Hamp. 455, 456.

(d) The question, what place is any person's domicile, or place of abode, is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived, where the circumstances tending to fix the domicile are so nearly balanced, that a slight circumstance will turn the scale. In some cases where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicile, but for the circumstances attending the other, the intent of the party to consider the one or the other his domicile, will determine it. One rule is, the fact and intent must concur. There are certain well settled maxims on this subject. These are, that every person has a domicile somewhere; and no person can have more than one domicile for one and the same purpose at the same time. It follows from these maxims, that a man retains his domicile of origin till he changes it by acquiring another; and so each successive domicile continues, until changed by acquiring another. And it is equally obvious, that the acquisition of a new domicile does, at the same instant, terminate the old one. Opinion of the Judges of the Supreme Court of Massachusetts, in Supplement to 5 Metcalf, p. 588, 589.

(e) *Greene v. Greene*, 11 Pick. 410. But a person can have only one domicile for one purpose, at one and the same time. *Abington v. North Bridgewater*, 23 Pick. 170. See *Thorndike v. City of Boston*, 1 Metcalf, 242; note (d) *supra*. Opinion of Supreme Court of Massachusetts, 5 Metcalf, Supplement, 588, 589.

A new domicil cannot be acquired during pupillage, or, until the person is *sui juris*, (a) [p. 787.]

Distinction upon contemporary domicils; in the case of a nobleman or gentleman, generally, the domicil is the mansion-house in the country: that of a merchant is at his residence in town, [p. 789.]

Custom of York, [p. 790.]

THE question in these causes was, whether the distribution of the personal estate of the late Lord Somerville, who died intestate, seised of real estates in Scotland and in Gloucestershire, and possessed of personal property in the English funds to a very large amount, should be made according to the law of Scotland or the law of England. The claimants by the law of Scotland were his Lordship's nephews and nieces of the whole blood, exclusive of Lord Somerville, as being the heir at law entitled to the real estates. They were the children of the intestate's deceased brother and sister of the whole blood, Colonel Somerville and Ann Whichmore Burgess. Sir Edward Bayntun, half-brother to the intestate, being the surviving son of Lady Somerville by a former marriage, and two nephews and two nieces, of the half-blood, being the children of a deceased brother and sister of the intestate by a former marriage, claimed to participate in the distribution under the law of England. Lord Somerville obtained letters of administration.

The following circumstances were established by the evidence.

That branch of the Somerville family, from which the late Lord was directly descended, had been wholly settled in Scotland above *six centuries. His father, James, Lord Somerville, first came to England in 1721 at the age of twenty-three, for the purpose of prosecuting his claim to the Barony of Somerville; which he established in May 1723. In 1724 he married Mrs. Rolt of Spye Park; where he resided with her on her estate till 1726; when he returned to Scotland. His daughter Ann was born during that residence in England. He continued in Scotland, where his two sons the late Lord Somerville and Colonel Somerville were born, till 1731; in which year he went to Bristol on account of Lady Somerville's health. In 1732 he returned to Scotland; and continued there till Lady Somerville's death in 1734; when he went to England to bury her and to surrender her estate to Sir Edward Bayntun, one of her sons by a former marriage. In 1736 Lord Somerville married again; and immediately returned to his residence in Scotland; where he continued till 1741; when he

(a) That is to say, as Sir William Grant explains it, he cannot acquire a domicil by his own act. In *Pottinger v. Wightman*, 3 Mer. 79.

A child remaining under the care of its mother, after the death of the father, will follow the domicil which she may acquire, in a case free from fraud. *Pottinger v. Wightman*, 3 Mer. 67; 2 Macpherson on Infants, (Lond. ed. 1842) 578, 579. Whether a minor can gain a new domicil with the consent of his father, who does not change his own, see ib.

The domicil of a person *non compos mentis*, under guardianship, may be changed by the direction or with the assent of the guardian, express or implied. *Holyoke v. Haskins*, 5 Pick. 20. See *Upton v. Northbridge*, 15 Mass. 239; *Cutts v. Haskins*, 9 Mass. 514; *Buckland v. Charlemont*, 3 Pick. 173; *Guiser v. O'Daniel*, 1 Binn. 349, note; Story, Confl. Laws, § 46, note.

was elected one of the Sixteen Peers; and came up to attend Parliament; and resided three winters in London for that purpose, going in summer to his estate in Scotland. In 1744 being appointed a Lord of Police in Scotland, he went to reside there; discontinuing from that time his Parliamentary attendance. He continued in Scotland, till he went to England in 1760 or 1761, to be presented to the King and to visit his daughter. After passing six weeks in England on that occasion he returned to Scotland; and never again quitted it; dying at his house there in 1765. His residence in Scotland was at the family seat, called The Drum, or Somerville-House, in the summer, and at apartments, which he had in Holyrood-House, in winter.

The late Lord Somerville was born on the 22d of June 1727 in Scotland, either at Somerville-House, or at Good-Trees, an old mansion in the neighborhood, rented by his father, while the house was re-building. He remained there till the age of nine or ten years; in the course of which period he was at school at Dalkeith, and afterwards at Edinburgh. At the age of nine or ten he was sent into England to Mr. Somerville in Gloucestershire. He was at school there for some time; afterwards in June 1742 he went to Westminster School; which he quitted at Christmas 1743. He then went to Caen in Normandy for the purpose of education; where he remained till the age of eighteen; when upon the rebellion breaking out in Scotland in 1745 being sent for by his father he returned to Scotland; joined the royal army as a volunteer; and was present at the battles of Preston Pans and *Culloden; at which he [*752[served as an aid-de-camp to Generals Cope and Hawley.

He continued in the army till the peace in 1763; and at different times during that period was in England, Scotland, and Germany, wherever his regiment happened to be, either in quarters or on service. Soon after quitting the army in 1763 he went to Scotland, to Somerville-House; and his father settled an annuity upon him. He then went abroad. In September 1765 on account of his father's illness he returned to Scotland; was present at his funeral in December in that year; and continued in Scotland about six months afterwards; but not succeeding in an application for his father's apartments in Holyrood-House he went to London; but did not turn off any of the servants at Somerville-House. From this period, in 1766, there was no evidence as to the actual residence till 1778 or 1779 (1), farther than that he passed the winter in London and the summer at Somerville House. In 1779 he took a lease of a house in Henrietta Street, Cavendish Square, for twenty-one years, determinable at the end of seven or fourteen years, at a rent of 84*l.* a-year. He continued to occupy this house as his winter residence till his death; going every year to Somerville House for the summer; and dividing the year nearly equally between them.

(1) The fact was that during the former part of that period Lord Somerville had furnished lodgings in London; and during the latter part occupied the house, of which he afterwards took a lease; which appeared by the parish rates since 1773; beyond which they could not be found.

The landlord of the house having purchased the ground-lease, of which thirty-six years were unexpired at Midsummer 1787, Lord Somerville endeavored to get him to relinquish it for a premium; and expressed regret at the refusal. Being assessed to the taxes at 90*l.* per annum, he appealed; and was reduced to 84*l.* per annum. About ten years before his death he was elected one of the Sixteen Peers; and he attended his Parliamentary duty every winter.

In Scotland Lord Somerville's establishment and style of living were suitable to his rank and fortune. In London he had only one or two female servants; and brought two men servants from Scotland; taking them back with him; and using job horses occasionally. His manner of living here was very private; seeing no company; dining usually at a club; and keeping his servants on board wages. The house was out of repair; and furnished upon a very limited scale.

The furniture, with the wine, coals, and plate, sold only [*753] for 66*l.* 7*s.* 1*d.* and the fixtures *for 73*l.* 10*s.* To some of his friends he declared repeatedly, that he considered his residence in London only as a lodging house, and a temporary residence during the sitting of Parliament; and spoke of Scotland as his residence and home, where he was born, with the warmth of a native; and he often complained with acrimony, that in any disputes, which he had, which came before the Session, it appeared to be a disadvantage to him residing so little among them. About a month before his death Colonel Reading urged him to make a will; observing, that it would be cruel to leave his natural children without provision; upon which he said he meant to take care of them and also of his brother's younger children; and soon after this conversation the intestate told Colonel Reading, (the deponent,) that he had seen Sir James Bland Burgess; who had alarmed him by telling him, if he died without a will, his personal estate would be divided among the several branches of his family; which he much deplored; and afterwards he said, he should soon go to Scotland; and would then make his will.

Soon after that conversation Lord Somerville died suddenly at his house in London in April 1796, during the sitting of Parliament. In the books of the Bank of England he was described as of Henrietta Street, Cavendish Square.

Elizabeth Dewar, who had been housekeeper at Somerville-House, by her depositions stated, that she had heard the intestate say, he was an Englishman; and when she told him, that when speaking against Scotland, he was speaking against his own country, he would answer, that he was born in Scotland: he was educated in England: his connections were English; that he had no friend in Scotland; and every thing he did was after the English fashion. The deponent had heard him say, his reason for going to Scotland was, that he might be at his estate; that he did not like it; but had promised his father when dying, that he would live one half of the year in Scotland, and the other in England; that he considered himself an Englishman; that his estate in England was preferable to that in Scotland; that he preferred England; and would never visit Scotland

except on account of the promise to his father; and that he did not care though Somerville House were burnt; and this he frequently said in conversation with the witness.

* There was some farther slight evidence of expressions [* 754] importing a preference of England; and that he considered himself an Englishman.

The *Attorney General*, [Sir John Mitford], the *Solicitor General*, [Sir William Grant], Mr. Newbold, and Mr. McIntosh, for the Plaintiffs in the first cause; Mr. Mansfield, Mr. Adam, and Mr. Lockhart, for the Defendants in the same interest; claiming as next of kin of the whole blood by the law of Scotland. — The question in these cases must now be understood to depend entirely upon the domicile of the late Lord Somerville: the cases decided having put entirely out of sight the *Lex loci rei sitæ* with reference to this question. It was never understood in this or any country but Scotland, that the succession to movable property could be regulated by two different laws. Some decisions in that country certainly did assert that proposition: but in *The Annandale Cause* (1) it was not thought a subject of question; and Lord Hardwicke in *Thorne v. Watkins* (2), the House of Lords in *Pipon v. Pipon* (3), and Lord Macclesfield and Sir Joseph Jekyll in prior cases, had no doubt upon it: but the point was completely decided in *Balfour v. Scott* (4), *Lady Titchfield's case*; in which the ground of the judgment in the House of Lords was expressly declared to be, that the personal estate of the intestate was to be distributed by the law of England, where he had his domicile. That declaration was certainly intended to put an end to the possibility of raising the question in future. The doubt was raised in the case of *Bruce v. Bruce* (5), from the manner, in which the judgment was given, out of some tenderness to what had passed in Scotland. The Interlocutor of the Court of Session was so worded, that it might have been understood to go upon the *Lex loci rei sitæ*: but it was not so understood in the House of Lords; who were of opinion, that the personal estate in England, was to be regulated by the law of England, not because it was situated in England, but because the domicile was in England. In *The Annandale Cause*, the Lord Chancellor takes the question as concluded; for he intimates a doubt of his own upon it, if it was open.

Excluding the *Lex loci rei sitæ*, the Court must have recourse to the law of domicile; and the question must now be taken to be, * where the late Lord Somerville is to be considered [* 755] as having had his domicile at his death. At his birth without question his sole domicile was in Scotland; the only place, with which he had any connection. His father had no establishment in England. When he was in this country as one of the sixteen Peers of Scotland, he resided chiefly with the Bayntun family. There can

(1) *Bempde v. Johnstone*, ante, vol. iii. 198; see the note, 203.

(2) 2 Ves. 35.

(3) Amb. 25.

(4) In the House of Lords, 11th April, 1793. 6 Bro. P. C. 550.

(5) 7 Bro. P. C. 566.

be no doubt therefore as to his domicile ; and the domicile of origin of the late Lord, the place of his birth, continued during his father's life. During that period there is no pretence to say, he had any other domicile than the house of his father. He had no other fixed and settled habitation. As heir apparent of the family he is to be considered in a different light from a younger brother. The heir apparent must always look to the family house and estate, as that to which he is to return, and which is to be his ; an object of residence and attachment, which does not belong to the other branches of the family. At his father's death in 1765 he had no house whatsoever except Somerville-House. If he had died at that period, there could have been no doubt. There was no place in England, that could be deemed his domicile ; though he had an estate in Gloucestershire. It lies upon the other side to show, that the clear, unquestionable, domicile, gained by birth, which continued during the life and after the death of his father, was abandoned and given up, and that he ceased to be a resident in Scotland. Scarcely any degree of residence in England without abandoning his residence in Scotland would be sufficient to change the domicile. From 1765 to 1778 there is nothing to change it. From that period though he resided in the winter in London, and only in the summer in Scotland, his permanent and constant residence must be taken to be Somerville-House, not the house in London, though held upon a term, that was likely to endure beyond his life : but the nature of the residence was not of that description, which is emphatically styled *domicilium*, and in the Civil Law (1) is thus described :

"Ubi quis Larem rerumque ac fortunarum suarum summam constituit."

Somerville-House without doubt was considered by him as his fixed and permanent residence, that of his family ; and [* 756] the other * a residence of convenience. There he considered himself rather in the character of a private gentleman : at the other as Lord Somerville. He was a man of economy : but it is clear upon the whole evidence he lived more in the style of a nobleman at Somerville-House ; and certainly by no means so in Henrietta-Street. His residence for the purpose of Parliamentary duty, on being elected one of the Sixteen Peers in 1790, according to all the law on the subject would have no effect. It is very convenient, that the original domicile should continue, unless an abandonment is shown ; and it is agreed by all writers on this subject, that from the moment you fix the domicile, an abandonment and a complete substitution of a new domicile must be shown. It is not enough to show residence in another place : the residence in the ancient domicile likewise continuing. The one must completely supersede and do away the other. The presumption in all cases therefore is against change of domicile ; and the burthen of proof lies on

(1) Cod. Lib. 10, tit. 39, l. 7. See, also, Dig. Lib. 50, tit. 16, l. 203, which is thus expressed ;

"Eam domum unicuique nostrum debere existimari, ubi quisque sedes & tabulas haberet, suarumque rerum constitutionem fecisset."

that side. By residence as an officer in quarters in England a new domicil could not be acquired. As to his winter residence, which was lengthened, as he grew older, let them take the fact most favorably for them: admit, that he resided seven months of the year in England: is that a sort of residence under all the circumstances, that supersedes the domicil he had; showing a purpose to abandon it to all intents? Suppose in 1766 he had yet a domicil to choose, and there was nothing to go upon but a residence in both countries, beginning at the same period, yet, taking with that the circumstances, that his residence in Scotland was upon his paternal estate, the seat of his honors, where his ancestors lived upwards of 600 years, the other in no way connected with his family, in which he lived in no state, a common lodging house, the domicil must have been in Scotland. In Scotland he lived as a nobleman, anxious to keep up his dignity, as connected with that country; and, though a man of economy, he lived there in a manner suited to his dignity. In England he had no furniture, no establishment: he saw no company: the servants he brought to town were part of his Scotch establishment; which was a regular establishment. How could it be said, when he was leaving town, going to his castle in Scotland, that he was going from home, as a sojourner, a stranger, a visiter; and that returning to London he was going, *ubi larem rerumque ac fortunarum suarum summam constituit*? Suppose him with an estate in England, and another in * Scotland; each [* 757] having a mansion-house and establishment, and that he divided his time equally between them: that would be something like a case: but even then the question, which was his proper country, must be decided in favor of Scotland; considering, that he was a Scotch Peer, and there was no reason to give a preference to England; other circumstances remaining the same.

The description of Lord Somerville in the bank books is merely that of the broker; and can afford no inference. Some of the witnesses speak to little expressions, denoting, that he wished to be considered an Englishman; and liked better to live in England than Scotland. That, which, it is to be observed, rests principally upon the suspicious evidence of a discarded servant, determines nothing. This is a question of fact. Dean Swift was very anxious to be considered as an Englishman: but he must have been considered domiciled in Ireland. It is idle to enter into little circumstances of that kind against such a weight of evidence. In *Balfour v. Scott* we were obliged to make use of such circumstances; which are only incidents in this case. Mr. Scott had the intention of completely abandoning his domicil in Scotland about twelve years before his death. His known purpose was that of watching the funds; in which he had invested his property. In the prosecution of that known purpose he broke up his establishment; leaving only a gardener: he only went two or three times to Scotland; and upon those occasions never resided at his own house; but was a visiter with his friends; and for the latter part of his life he never went to

Scotland. He had clearly chosen a different domicil ; which completely did away the *domicilium originis*.

In the case of Sir Charles Douglas (1) the circumstances were these. He left Scotland in 1741, at the age of twelve, with a view to enter into the navy. From that time to his death he was in Scotland only four times. 1st, as captain of a frigate: 2dly, to introduce his wife to his friends; on which occasion he stayed about a year: 3dly, upon a visit: 4thly, when, being appointed to a command upon the Halifax station, he went in the mail coach to Scotland, and died there, in 1789. He was not for a day resident there in any house of his own; nor as a resident. Under those circum-

stances it was strong to contend, that he retained the domicil [* 759] during all that time in a country, with which he had so little connection. He had no estate there, no mansion-house. He was not a Peer of that country. There was nothing but the circumstances of his birth and his death; and upon those circumstances, and because he had an occasional domicil there, the Court of Session determined, that he was domiciled in Scotland. He married in Holland: and had a sort of establishment there. He commanded the Russian navy for about a year; and was afterwards in the Dutch service. He had no fixed residence in England till 1776; when he took a house at Gosport; where he lived as his home, when on shore. That was the only residence he had in the British dominions. Whenever he went on service, he left his wife and family there; and he always returned to that place. His third wife was a native of Gosport. In his will he spoke of his dwelling-house at Gosport. Under these circumstances the cause came before the House of Lords. The Lords considered the circumstance of his death in Scotland, going there only for a few days, as nothing. The Lord Chancellor expressed himself to the following effect:

"The reasons assigned in support of the decision of the Court of Session are by no means satisfactory. His dying in Scotland is nothing; for it is quite clear, the purpose of going there was temporary and limited; nothing like an intention of having a settled habitation there. The Interlocutory says, he had an occasional domicil there: but the question never depends upon occasional domicil: the question is, what was the general habit of his life? It is difficult to suppose a case of exact balance. Birth affords some argument: and might turn the scale; if all the other circumstances were in equilibrio: but it is clear in this case, his circumstances, his hopes, and sometimes his necessities, fixed him in England. His taste might fix him at Gosport in the neighborhood of a Yard; a place also convenient to him in the pursuit of his possession. Upon his visit to Scotland by a letter he guarded his sister against the hope of his settling there."

The words of the Civil Law "*Larem rerumque ac fortunarum summam*" cannot be translated better than by the expression of that

(1) *Ommaney v. Bingham*, before the House of Lords, 18th March, 1796.

letter ; that he had no thought of setting up his Tabernacle there. It means the main establishment.

The Lord Chancellor then takes notice of his making a will ; * which would be totally subverted by considering [* 759] him domiciled in Scotland. It became important to determine the domicile in that case ; because by a codicil he had imposed a condition in restraint of marriage upon a legacy to his daughter, with a gift over to other children ; and it was contended, that the condition was void by the law of Scotland, but good by the law of England on account of the gift over (1). If Sir Charles Douglas had died in the Russian or Dutch service, his property must have been distributed according to the law of Russia or Holland ; for he had made himself a subject of those countries ; and by his establishment there had lost his establishment in Scotland. His original domicile having been abandoned, when he afterwards entered into the service of this country he became domiciled here ; as a Russian or Dutchman would on entering into our service.

Lord Anhandale's Case is still weaker. There was not even the circumstance of birth in Scotland ; and, with respect to Marquis William, he did not return to Scotland after his Parliamentary duty was closed ; and there were other considerable circumstances, importing an intention to continue in England. The decision was properly founded upon this fact ; that till a considerable period after the birth of Marquis George, there was nothing, that could by possibility afford a ground for contending, that he had a domicile in Scotland ; and it was considered by the Lord Chancellor, that it was necessary to show, that he had abandoned the domicile in England : and gained one in Scotland ; for which there was no pretence.

Can these cases be at all compared with this ? Lord Somerville never for a year together abandoned his residence in Scotland. In point of duration he had full as much residence there as in this country ; abstracted from the circumstances, that make that quite a different residence from this. In this case there was a mansion-house actually resided upon. Suppose, he had lived several years entirely in England ; going only occasionally to his mansion in Scotland : still that must have been considered his residence. His death in London happened in April, before the period of his usual annual return to Scotland. No intention is to be inferred * from [* 760] that : on the contrary there is direct evidence of his intention to get back to Scotland, when attacked by illness, and an intention when he should get there, to make an arrangement of his affairs ; looking to the law of that country. But it is sufficient to say, he died in the course of that temporary residence every year in England ; and there is nothing to show, he had abandoned the intention of returning, as usual. If he had died in the first winter of his residence in London, it might have been said, *non constat*, that was not intended to be his permanent residence. Even that

(1) See *Stackpole v. Beaumont*, ante, vol. iii. 89, and the references.

weak argument is taken away in this case; which is not a case, in which the Court is driven to the necessity of laying hold of little circumstances, to determine a question very doubtful, and of nearly even balance.

The MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN]. Have there not been any cases in the Spiritual Court with reference to this point upon the Custom of the Province of York? (1) There must have been many instances of two residences: one within the Province; the other without it. Then would the place of the death make a difference? The Custom, as expressed, affects the goods of every inhabitant dying there, or elsewhere.

I cannot form to myself any other argument for those, who claim by the law of England, except, that his death makes a difference; considering the residence equal. Therefore what do you say to this case? Suppose, a man having a *forum originis* in some other part of the world comes to live and to have a residence here and in Scotland; dividing his time equally between them. It is almost an impossible case. I am clearly of opinion, that I must be bound by the decisions in the House of Lords; that if there is a preponderating domicil, that must decide; and not the *Lex loci rei sitæ*. Those cases have clearly decided, that the *lex loci rei sitæ* is totally out of the question; except where a man can be considered as having no domicil. The Lord Chancellor in Lord Annandale's Case says, he should have thought, the point, if open, was susceptible of a great deal of argument: but his Lordship considered it decided; and so I understand it. Then in the case I now put, if the residence is equal, the question would be, whether the *forum originis* or the *forum mortis*, if I may so call it, is to furnish the rule.

[* 761] * They must contend, I think, that being equally domiciled in each country, the place of his death is to decide. Or, suppose him a foreigner, and nobody knows whence he comes, so that you have no *forum originis*, and the residence equal.

For the Plaintiffs. To make that case bear upon this, the question must be put as between the *forum originis* and the place of his death. Supposing a fixed, clear, domicil in Scotland, and then a degree of residence in England from thenceforth quite equal to that in Scotland, the circumstance of his death is not of the least weight; for if the domicil is once fixed, you must show a change of domicil. The death is accidental; and in Sir Charles Douglas's Case was laid entirely out of the question. The case of a man without a domicil cannot exist. If a child being illegitimate cannot have the domicil of his father, it must be the place of his birth; if he is born on board ship, the place, to which the ship belonged: if no other domicil can be found, the place where he was at his death. Every person must have a habitation of some description.

But this is not a case of *equilibrium*; which, if such a case can be supposed, must arise either from the habits of a vagrant life or an equally divided residence, with the absence of all evidence of birth

or extraction. The question of domicile depends upon facts and circumstances of residence, proof and presumption of intention of residence. The desire of the Roman Jurists to systematize and subtilize has occasioned their giving much greater weight to the circumstances of birth and extraction than they really deserve. The late decisions, agreeing with Bynkershoek, one of the greatest of them, in bringing it back to the true consideration, have held, that those are only some of the circumstances. In *Bruce v. Bruce* (1) Major Bruce, born in Scotland, but settled in India many years, professed an intention to return to Scotland; but not till he had acquired a competent fortune; and he died in India. He was held domiciled in England. That decision weakened the force given by the Jurists to the circumstances of birth and extraction; and determined, that a mere intention, depending upon a very doubtful event, would not do; that it must be a residence with a view to make it perpetual. But though birth and extraction * were there [* 762] decided not to be every thing, yet it was not held, that they are not circumstances of great importance.

Lashley v. Hogg only confirmed the principle, that the *Lex domicilii* is always to rule, and not the *Lex loci rei sitæ*; more strongly confirmed in *Balfour v. Scott*. In *Sir Charles Douglas's Case* there was nothing in favor of the Scotch domicile but the doctrine of the Civilians, and the extravagant weight given to the circumstances of birth and extraction. The English domicile prevailed rather by the weakness of the Scotch domicile than by its own strength. The same observation applies to Lord *Annandale's Case*; the Scotch domicile resting upon mere extraction, aided by property and rank; for even birth was wanting. That certainly, as the Lord Chancellor observes in that case, is a very small circumstance; being accidental; and the mere place of death is much more insignificant; for all other circumstances being equal, the circumstance of birth, slight as it is, might turn the scale; affording some presumption of affection: but that presumption, which alone can give any weight to the accident of birth, cannot be raised in the other case, of the death; which is liable to the same objection as the *Lex loci rei sitæ*; making the rule depend on accident, quite independent of the intention.

The next circumstance, *rerum fortunarumque summa* was wanting in *Bruce v. Bruce* and other cases. The next, the rank and dignity of Lord Somerville, of itself furnishes a link of connection; but the most important circumstance is, that the connection created by rank is strengthened by duty, as one of the Sixteen Peers. That is strong, as a link of connection with Scotland, and a reason for a temporary residence in England. The general principle of all the laws of Europe is, that a permanent public duty changes the domicile; that a temporary public duty does not. The word "*legatus*," as used by the foreign lawyers upon that subject, was applied chiefly to the Deputies of the towns and provinces of the Empire coming to present

(1) In the House of Lords, 15th April, 1790.

petitions. Huber applies this doctrine of the Roman law to the Deputies of the Dutch provinces attending their duty at the Hague; concluding, that residence for that purpose does not take away the original domicil: and the same was decided by a Court of very considerable authority, the Rota of Rome (1); and is adopted by Denisart, in his collection with regard to the law of France.

[* 763] * This circumstance is not to be found in any of the other cases. Another circumstance is the nature of the establishments; where the residence is pretty nearly equally divided between the Capital and the country seat. With respect to that, in the case of a nobleman or a gentleman of landed property, all other circumstances being equal, the circumstance of the country-house being upon his landed estate ought always to preponderate; and the other residence is to be considered secondary only. In this instance all the causes of preference from birth, rank, and also the *rerum fortunarumque summa*, apply to Scotland. Huber quotes a decision of the Supreme Court of Friesland, upon the 2d of July 1680, precisely upon that point; by which the domicil was held to be at the country-house; and his observation upon that is, that where the principal concerns are in town, that is the domicil; where in the country, the country residence. In Denisart, (2) are three cases, decided by the Parliament of Paris; one is the case of Mademoiselle De Clermont Santoignon; another is that of the Count De Choiseul, in 1656; who was held to be domiciled in Burgundy; though he went there only in the shooting season; and an opposite case is mentioned of a bourgeois in Paris; who paid the Capitation tax in the country; but that was held to be only his secondary residence; his principal concerns being in Paris. In Denisart, Dictionaire 2, letter D. p. 165, it is laid down, that the original domicil is constituted the first domicil; and that is preserved, till another is chosen. With respect to the particular question, the distribution of the personal estate, it is laid down, that the domicil continues, until changed; and the reason is the presumption of attachment to the place of birth and connections. Several cases are stated; all tending to establish the same point. From those cases it appears, a minor could not do any act to change his domicil; that a military man shall be presumed to have his *domicilium originis*, unless it is quite clear he meant to establish another; and unless that appears, in the case of a military man they always have recourse to the original domicil. In D'Aguesseau's Collection (3) the case of the Duke of Guise is stated; a case not strictly relative to the distribution of personal estate, but applying to this subject. The question was, whether it could be said, he had no domicil; or, that his domicil was not at Brussels; and the conclusion is, that the former is absurd; the latter more so; for all persons serving the King of Spain in

[* 764] Flanders cannot be considered * to have their domicils

(1) Farnese Decis. Rom.

(2) Article Domicil.

(3) Vol. v. 115.

elsewhere than in the Capital of the Low Countries. Every great lord is considered as having his domicil in the Capital; unless he has another in point of fact: but the Capital is resorted to only, in case there is in point of fact no other.

Apply that doctrine to this case; in which there is a domicil in point of fact.

Other cases are to be found in the same author. The case of a bastard is stated (1); and upon the question, what destroys the domicil of birth; it is laid down, that nothing has that effect but clear facts tending to establish this principle; a relinquishment of the native country, and a clear purpose of establishment elsewhere; and the number of years is limited. Cochin states the case of the Princes of Germany. He also states (2) the case of the Marquis De St. Paterre; who was born in Mayenne; became a page; and afterwards entered the army. He lived sometimes at Paris in hired lodgings; sometimes at the house of a friend; called in some acts of his, his hotel. He returned to the place of his birth and died there. The question was, whether the *domicilium originis* was destroyed; and it was held, not; and the reason is, that his residence at Paris was not more than was necessary in his way of life as a military man; that he kept his country-house; had there all his *instrumentum domesticum*; and notwithstanding some acts done at Paris the original domicil remained.

This is a precedent in all points applicable to the case now before the Court. Upon the doctrine of these cases it is clear, that where the *domicilium originis* is connected with birth, ancestors, property, muniments necessary to the support of that property, and acts done in respect of it, to get rid of that domicil there must be clear, distinct, positive, facts, combined with intention. Death is nothing without intention and volition; but where there is a previous intention of residence, confirmed by the fact of residence, the fact of death is a circumstance, that will be taken into consideration to fix the domicil: but in this case the fact is quite the other way; and the death merely accidental in London.

In *Bruce v. Bruce* the Interlocutor was affirmed; and the only reason of Lord Thurlow's delivering any opinion was, that the ground he took was different from that of the Court of Session. *Mr. Bruce was a younger son. The whole of his [* 765] personal estate was situated either actually in England or in India. The Court of Session determined upon the *Lex loci rei sitæ*. Lord Thurlow thinking that erroneous, entered into the question of domicil; and according to a very authentic note he was very unwilling to go into the question. Mr. Bruce, originally a younger son without fortune, was only once in Scotland. He returned from London to India; and never showed any intention of returning to his native country: nothing appeared but some expression a little

(1) Vol. vii. 373.

(2) Vol. v. 1.

before his death, that he wished to be considered a Scotchman. That is not like this original, continued, connection with Scotland; attended with rank, property, &c. Mr. Bruce resided in India his whole life, except about one year in London.

In *Balfour v. Scott* (1), I admit, Mr. Scott was the son of a gentleman of property: but during the latter part of his life he did clear acts of desertion of the *domicilium originis*; selling off his establishment; dismissing his servants, &c. He was only once or twice in Scotland; and then in the house of a relation. His whole attention was applied to this country. He had no intention of returning to Scotland: on the contrary, an intention of not returning was demonstrated by facts; and he had made it impossible to go to his own home in Scotland. It is impossible to apply that case to this: Lord Somerville's residence in London being a mere lodging house; all his muniments, furniture, &c. being in Scotland: though a man of economy, having great regard for the honor and dignity of his family; living penuriously in England, in Scotland like a nobleman of his fortune at his family seat; returning constantly to his home; which was always established as his home; a home consistent with his rank in life and the show belonging to it.

The case of Sir Charles Douglas has but one feature of similarity to this: the entry into the service at an early period of life. The distinction is, that Lord Somerville, upon the death of his father, returned to his residence in Scotland; and fixed himself there; having only a temporary residence in London: Sir Charles Douglas after a long naval life, partly in different foreign services, established himself at Gosport; and there was no reason to suppose he ever meant to have a permanent establishment in Scotland. In Lord

Annandale's Case there were some circumstances of similarity; * others, directly opposite; and all these cases, being mere clues for the direction of the judgment of the Court, must be considered with all their circumstances. William, Marquis of Annandale, lived in Scotland in the house of his first lady; which after her death passed into the Hopetoun family. He was one of the Sixteen Peers. After his second marriage he never returned to Scotland; he lived in England; and died at Bath. Marquis George was born and educated in England. His visits to Scotland during a period, when there were great doubts of the sanity of his mind, were made as to a country where he had no home. The only evidence was, that he stamped his foot upon the ground there and said, "here I build my house." Compare that case with this. The Lord Chancellor in his judgment has very accurately summed up the points establishing the domicil of Lord Annandale, showing, what would be his judgment upon this case: The principal circumstances are reversed here. Lord Somerville was born in Scotland: his expectations of fortune, settlement and establishment were there: he always had a residence in Scotland: Lord Annandale never:

the existence there of Lord Annandale purely a purpose of either visit or business: and wherever he had a place of residence, that could not be referred to an occasional and temporary purpose, that was in England: in this case the residence was temporary in England. Upon comparison of the cases the same principles must determine in favor of the Scotch domicile; which was never changed. The reason stated by Lord Hardwicke against the adoption of the *Lex loci rei sitæ*, that it would prevent foreigners purchasing in our funds, is equally strong against changing the *domicilium originis* upon slight circumstances.

When did Lord Somerville begin to acquire a domicile in England? If not in the first six months, he never did. As to his actual residence, the time he was at Westminster School must be subtracted, according to all the Jurists; and as to the remaining period, considering the particular reason of it, and the establishment kept up in Scotland, there is nothing like an equilibrium. The only positive evidence in favor of the English domicile is, that he expressed a dislike to Scotland; and said, his reasons for going there, was the dying injunctions of his father: but the wish of the party has no effect in constituting a domicile; though the intention certainly has. That evidence proves decisively his intention to *keep up his Scotch residence. In *Bruce v. [* 767]* *Bruce* there was only birth, and paternal residence and extraction, with an intention to return at some time uncertain. In *Balfour v. Scott* there was a complete abandonment, and change of establishment. In *Sir Charles Douglas's Case* there were birth, and paternal residence and extraction; but neither property, nor estate; and there was positive intention never to settle in Scotland. In *Lord Annandale's Case* there was property and rank; but neither birth, nor public duty: nor any of the circumstances to be found in this case. All presumption is in favor of the Scotch domicile; and nothing in favor of the English but this particular residence of a few months in the year, accounted for in a great degree by public duty, and, admitting he took the house antecedent to the commencement of that duty, answered by the establishment kept up in Scotland. The evidence of his intention to make a will upon his return to Scotland, alarmed at the possibility of a distribution, that would take in the half-blood, proves, that he had not a person in this country whom he intrusted with the management of his affairs.

With respect to the supposed case put by the Court of a foreigner coming here, having a domicile abroad, or no known domicile, and then an equal residence, upon the question, whether the death shall not decide, the analogy to the rule in *Godolphin* (1), as to the place, where the will is to be proved, goes a great way to decide that. In the case stated from *Cochin* the death was connected with circumstances of intention and establishment: but in *Sir Charles Doug-*

(1) Part i. ch. 20, fo. 58.

las's Case it was considered of no weight, notwithstanding his connections in Scotland, being merely accidental. Lord Somerville died with a clear intention to return to Scotland: the Parliament then sitting; and the period of his return not arrived. The place of his death therefore was mere accident, not coupled with intention, or any fact denoting it. The effect of the change of domicile may be considered as against the compact of the two countries upon the Union (1); that the municipal laws concerning private right shall not be altered except for the evident utility of the subjects within Scotland; and though that certainly relates to legislative alteration, it is a guide to prevent alteration by the effect of judicial authority. The only case, that can be found, applicable to [*768] the custom of *the province of York is *Chomley v. Chomley* (2); in which it was held, that the Custom of London, where the residence was, controlled the Custom of York. The privilege of strangers to have a distribution according to the law of their own country depends upon a principle of the law of nations.

Mr. Piggott, Mr. Lloyd, Mr. Romilly, Mr. Sutton, and Mr. Steele, for the Defendants, claiming under the law of England (3).—This question arises upon the death of a person in London; where he had lived for a great number of years: the property also is found here: the bill filed, and administration taken out in this country; and all the parties to the cause are here. This case does not afford the singularity of a foreigner coming here, and claiming under a foreign law. It is the common case of the death of a person in London, having property and relations here. Those, who claim this property exclusively call in the aid of a foreign law; which has no recommendation or title to preference over the law of this country from its superior reason or wisdom. This question is recent in this country. The Courts of Justice will not resort to foreign law without great caution and considerable regret; particularly upon questions of fact; which, if depending upon the mere opinion of the Judge, unrestrained by any rules of law or evidence, must come to arbitrary decision. It is therefore the more important to collect the rule from that, which appears to have been decided, and to abide by it. The only rule, that can be collected, is, that though it should be true, that in the distribution of the property of infants the law of the domicile of origin is to guide; not, of the place of birth: for that is not the correct notion of the domicile of origin; it may be purely accidental, on a voyage or a journey; but the domicile of the father; the rule adopted by the Civil Law; or rather the law of France; for the Civil Law on this subject has reference rather to the burthen of offices than the distribution of property: yet, admitting that to be the rule, it is impossible not to observe upon all the authorities,

(1) Article 18.

(2) 2 Vern. 48.

(3) Mr. Richards, for the Defendant Lord Somerville, observing, that, though his interest was under the English law, his wishes were in opposition to it, did not argue the question.

that it is confined to cases, where no will has been exercised on the subject of habitation and abode; that natural privilege of every man, sanctioned by the laws of all countries, to choose for himself; and the domicile of origin is resorted to, because no intention is shown to have any other: * but if the will of the person has been exercised on the subject of abode and habitation, that rule gives way. [* 769]

Where the evidence is so extremely equal, that the Court finds itself in that situation, that it must resort to something else than residence, as it does, when it resorts to the domicile of origin, then, this being the country, where the property is, where the intestate resided, and had a domicile, friends and connections, when the origin has been so long out of the question, why is the Court to adopt that for the sake of adopting a law distinguished neither for wisdom, reason, or humanity, and to reject the law of the country in which it sits? Inextricable confusion will be the consequence, if the circumstances of this case do not prove the domicile in this country. When the territorial property goes according to the law of Scotland, there can be no reason to complain of injustice to these persons. It is impossible upon the cases in the House of Lords to suppose, that the domicile of origin was the rule resorted to. If they were persons living in the world, in the pursuit of fortune, foris-familiated, the question was, where was their domicile: where did they live at the time of their deaths, not of their origin? If the origin is the principle, it must have had an effect in those cases infinitely beyond what it can in this. If origin is to be looked to, it is impossible to conceive a case, in which that must not decide. This is a question of fact: a question, which it was the object of the House of Lords, and of this Court in the only case decided in this Court, to simplify as much as possible; to avoid the difficulties, into which the question will run, if the doctrine the Court has heard upon this occasion is warranted.

It is only necessary to read the Lord Chancellor's judgment in the last case to decide, where was Lord Somerville's home in 1796; when he died: where was the seat of his affairs: where, in the words of the Civil Law, did he pass his festivals; and where was his property. This residence has been stated, as if it was occasional and temporary. The question for a jury would be, was not this the peculiarly chosen abode; not cast upon him by accident in 1796 and at his death in that year? Nothing can constitute a choice, if this case does not afford evidence, that he exercised it. What is there to show, this is not the place, where Lord Somerville would have been, no particular circumstances * determin- [* 770] ing his position in some other place; according to the Lord Chancellor's expression (1). Where is the *animus revertendi* to be found? Where was the seat and centre of his affairs and the management of his fortune? Can it possibly be doubted, that it

was in London? He had a small paternal estate in Scotland; which he did not sell; and if in the summer, when no man of his description is found in London, if his economical turn, induced him, instead of a watering place, to go and have the satisfaction of seeing his paternal estate, could that change his fixed and permanent residence? If in the progress of things that estate was of more value at his death, yet there is no comparison between his property in the two countries: the estate in Gloucestershire exceeding 1000*l.* a-year; and the property in the funds amounting to 50 or 60,000*l.*; of itself more than countervailing the estate in Scotland. In the books of the Bank, constituting his only title to this vast property, he is invariably described as of Henrietta-Street, Cavendish-Square.

This case has many circumstances like Mr. Scott's. He kept his family estate, a large estate; and the house was not quite dismantled; for he kept one room: yet it was held, that the domicile was in England; though his residence here was only for the last nine years of his life; which in this case is thirty years. It is in evidence also, that Lord Somerville had natural children (1), and was not married. The Lord Chancellor in Lord *Annandale's Case* refers (2) to the habits of his life, his friends and connections, and all the links, that attach him to society. In this instance all his habits, connections, and pursuits, are found in London. Are these children, with the claim they have upon him, and the natural relation avowed by him, no tie or connection upon such a question? Lord Somerville laments, that he suffered some inconvenience from not residing sufficiently in Scotland. That shows, England was his home. He does not deny the consequence of his residence in England, or say, that it shall be changed. He merely complains of it as an inconvenience. That is an express and unequivocal affirmance of that, which was the effect of his own choice; the domicile he invariably had in London.

[*771] *Next, as to the nature of the establishment in London: the manner of life is objected to; not the constancy of it; which is the circumstance to constitute a domicile: not the manner of living there; whether parsimoniously, or otherwise. Suppose, he dined frequently at a club; kept his servants on board wages; and did not see a great deal of company: is that to give a character to his residence: or, that he travelled down to Scotland and received the compliments of his friends and neighbors on his arrival; and left servants there on his return to London? His motive might have been not to part with the family estate, and the house built by his father, and left by him unfinished. Are we to compute the hours he passed in each place? In *Bruce v. Bruce* what became of origin? There was a clear intention of returning. Mr. Bruce was a gentleman of family. His residence in India was for a temporary purpose, to estab-

(1) The Court expressed surprise, that the circumstances as to these children, which might be material, were not brought forward by evidence. An inquiry was proposed; but was not directed.

(2) *Ante*, vol. iii. 202.

lish a fortune : not intending to take up his residence there ; but a fixed intention to return in his mind. If origin, coupled with residence for a temporary purpose, and an intention to return, is to decide, it must have had effect in that case : yet the distribution was held to be according to the law of England ; by which India is governed. Why is not the long residence in this case, employed in the acquisition and management of fortune, to have the same effect against the domicile of origin ? The reasoning would be correct in subtracting the residence on account of his being in Parliament, if the residence had been taken for that purpose.

How can *Balfour v. Scott* be reconciled with their argument ? There was a paternal estate and a mansion house : but for the last nine years he had visited Scotland but three or four times. In *Sir Charles Douglas's Case* what was the residence to repel all the circumstances : birth and death in Scotland, a respectable Scotch family, service in the British navy, then in the Dutch, then in the Russian, then in the British again ? Merely, that he had a house in Gosport ; which he quitted in 1783 ; dying in 1799. In that interval he had been in Amsterdam ; where he had married his first wife. In the Annandale cause the domicile of the father was resorted to ; which was thought material ; as it was supposed what Marquis George had done during his long lunacy had not fixed a character upon his residence in this country. If the acts done in that case were sufficient to shut out the question of the domicile of the father, *a multo fortiori* there is a choice of domicile in * this case. Was the residence here constrained, from [*772] the necessity of his affairs : was it transitory, as a so-journer ; according to the expressions of the Lord Chancellor (1) : was it for a temporary purpose ? The residence of Lord Somerville was the seat of his fortune. It was not the place of his birth : but upon that the Lord Chancellor says the least stress is to be laid : but it was the place of his education (2) ; which is a link in the connecting chain. Lord Somerville prided himself on his English education ; the object of which upon the evidence was to avoid the Northern dialect. Consider also what the Lord Chancellor says in the same place of the Douglas cause.

The conclusion is, that where there is positive, fixed, residence, it is not a question of more or less of it : but it excludes the *domicilium originis*. We are discussing, what will has been exercised upon the subject. The visits of Lord Somerville to Scotland might be under the injunction of his father, the opposite to choice. Safety and certainty are on one side of this question : on the other the utmost uncertainty and inconvenience. There was no such length and character of residence in any of the cases in the House of Lords. Lord Somerville a month before his death speaking of his object to

(1) *Ante*, vol. iii. 202.

(2) The Master of the Rolls here observed, that he could not think, the Lord Chancellor meant the place, where he was at school, but education coupled with the residence of his parents.

provide for his natural children, and his brother's younger children, states his intention to make a will to prevent his property from being torn to pieces. The fair inference is, that he did not deny the effect of his acts. A declaration under such circumstances, not qualifying, but proposing a remedy, is perfectly consistent, with the permanent domicil in England. It would be equivocal, if the natural children were the only objects: but the object also was to exclude the half blood from his intention in favor of Colonel Somerville's children. Upon the other construction he would have said, he did not mean permanent residence by all this. The question must be decided by fixed residence; though, where there is no fixed residence, the domicil of origin may be resorted to. In *Burn v. Cole* (1) Lord Mansfield said, that in *Pipon v. Pipon* (2) the distribution of an intestate's effects was held to be according to the laws of the country, where the intestate resided and died; and in a case there cited his Lordship says, that case ought to have [* 773] been decided *upon the residence. In the former of those cases the residence in London, that destroyed the effect of the residence in Jamaica, was not more than a year. *Pipon v. Pipon* was decided upon the ground, that debts follow the person of the creditor.

The Roman Law is to be laid quite out of the question upon this subject. The very definition of the domicil by that law is quite inapplicable to modern manners. By that law the subject was considered only with reference to the burthens to be imposed upon a man, not as to the succession to his movable property. In *The Digest* (3) this is stated: "*Viris prudentibus placuit duobis locis posse aliquem habere domicilium*;" and the case is put of a divided residence, perfectly in *equilibrio*; and they differed upon the effect of it. Labeo decided, that the party had no domicil at all: others held that he had several domicils (4). That shows, how inapplicable every thing in the Roman Law is to the question as to the succession to the movable property of the intestate. As to the law of France and Holland, certainly it is of great importance to consider, what the law of modern Europe is; as nothing is to be found upon it in our law. It is very important, that the same rule should prevail as to the succession. The definition of the domicil in the modern law of Europe is very plain and simple. In *Vattel* (5) it is thus described: a fixed residence with an intention of always staying there; or in French "*l'intention se fixer*." The definition in *Denisart* is pretty much the same. It consists in the fact and the intention: actual residence, and the intention to establish himself in the place where he resides; and no habitation, however long, will do unless with that intention.

(1) Amb. 415.

(2) Amb. 25.

(3) Lib. 50, tit. 1, l. 6, s. 2.

(4) Dig. lib. 50, tit. 1, l. 5.

(5) B. 1, c. 19, s. 218, p. 103.

This case then naturally divides itself in two parts : 1st, the period prior to the death of the intestate's father : 2dly, what has taken place since. This case depends entirely upon the latter : but the original domicil has been very much insisted on for the purpose of throwing upon us the burthen of showing, that domicil was abandoned. It is necessary for us to show, Lord Somerville acquired another domicil ; not, that he had abandoned his first domicil ; for that is *ipso facto* gone by the acquisition of the other : otherwise all the cases, that have been referred to, which are very frequent * in the French law, of two habitations, one in the capital, the other in a Province of France, would have been decided in an instant. In the case of Mademoiselle De Clermont Santoignon she certainly never abandoned her first domicil ; but always went there in the summer ; and the same observation applies to the case of the Marquis De St. Paterre : but the question was, whether there was not so much more continued residence in the capital, that a new domicil was acquired ; which put an end to the original one. When once it is established, that the domicil depends upon the fact and intention of residence, frequently you must have recourse to the domicil of origin ; as in the case of an infant ; and that is the reason given for the position, that the domicil may be in a country, in which the party never was. That the domicil of origin is never to be resorted to, when any other can be found, appears in many writers : Houard's Dictionary of Norman Law, art. Domicil. The domicil of habitation is the only one, to which we pay any regard. That scarcely any regard is paid to the other in our law appears from the very few cases ; which are only four : the question as to what circumstances constitute a domicil not being at all considered in *Lashley v. Hogg* (1). The words of Lord Thurlow in the case of *Bruce v. Bruce* are printed in Mr. Ommaney's Petition on the Douglas cause. His Lordship says, the origin is to be received but as one circumstance in evidence ; but it is an erroneous proposition, that the domicil is to be held to be, where the party drew his first breath, without something more : it is *prima facie* evidence ; but may be rebutted. Mr. Bruce settled abroad ; enjoyed the privileges of the place : he might mean to return, when he had made his fortune : but can it be contended, that his original domicil continued ? Granting, he meant to return, he meant to change his domicil ; but had not done so at his death.

In Voet upon the Pandect (2) that very case of going to India *negotiorum ratione* is stated ; and that a modern law was made upon the subject in Holland. It is said, that when Sir Charles Douglas quitted Scotland, he had lost his domicil immediately : but it was never suggested in that case, that he was domiciled in Russia or Holland ; and it was said, that, when he came into the British service, he came as a Briton. That must be recollected

(1) 6 Bro. P. C. 577.

(2) B. 5, tit. 1, s. 98.

with reference to the circumstances, under which Lord Somerville quitted his country originally. Mr. Scott had nothing like an establishment in this country. He lived either in chambers or a small house. But I principally rely on *Lord Annandale's Case* to show, that the domicil of origin is hardly regarded in our law; for in that case particularly it ought to have had weight, if it ever had. A distinction is made in all the writers between the *domicilium originis* and the *domicilium natiuitatis*. The latter is never the domicil; unless the other cannot be ascertained. The Lord Chancellor would not decide the question as to the domicil of Marquis William; not considering the domicil of origin at all material. The residence of Marquis George with his mother in England had been relied upon; and there is some little allusion to it in the judgment: but Pothier, a writer of great authority, treating of the custom of Orleans in the first section of his introduction as to the Customs of France, is clear, that the domicil of a minor cannot be changed by the residence of the guardian. Lord Annandale was of a most unsettled disposition. His letters showed a dislike of all parts of this island. His habits were foreign. It seemed necessary there to settle the domicil of his father; but the Lord Chancellor would not decide it; saying only, that it was not clear, the domicil of Marquis William was not in England. Till the Union he came here only once, as a foreigner. He was violent against the Union; and never came to London to reside till long afterwards; when he was elected one of the Sixteen Peers. He had three houses in Scotland; and was attached to that country by many circumstances, that cannot exist here: he had many hereditary jurisdictions, and some of the Dumfries boroughs. He had resided three years in England before the birth of the Marquis George; and had married a Dutch lady in England. It is true, he had brought furniture from Cragie Castle; as he might very easily do by sea: but the circumstances were very slight to prove a change of domicil.

One principle, and only one, can be collected from all these cases; that in countries circumstanced as England and Scotland the presumption is always in favor of the English domicil. It is to be presumed, a Briton means to consider himself as a Briton, and not as a Scotchman merely; and upon all the cases of the French noblemen, as that of the Count De Choiseul, it is to be observed, they are nothing at Paris: in the country they had privileges, as

[*776] *Lords of those districts; which were all lost at Paris.

Therefore the presumption was, that the domicil was in the country. These districts taxed themselves; and had other privileges; which existed even at the Revolution. There can be no such presumption in the case of a Scotch nobleman. He has the same privileges in London and in Scotland. In Domat (1) it is said, as there are places exempt from certain contributions, the inhabitants of those places enjoy the exemption only, during the time

(1) Vol. ii. b. 1, tit. 5, s. 7, par. 13.

they live there; and cannot transfer the privilege to another place. These privileges exist in the French cases, but not in this. If the circumstance, that seems to be relied on, as distinguishing this case from that of Sir Charles Douglas, that Lord Somerville was the heir apparent of the family, gives any additional weight to the domicile of origin, it is singular, that it is not noticed in any of the cases. How can that distinction be material, considering the origin of the law of domicile? By the Roman law all the sons, till emancipated, were equally *filiæ familias*. What greater uncertainty can there possibly be than relying upon such a circumstance with a view to judge of a man's acts and intention to acquire a domicile in another place? Certainly the consideration of birth and the expectations he has in the country, where his father was settled, are not to be laid out of the case. Those are circumstances to be used to show, where it was likely the son would wish to be domiciled: but when you have the fact of his residence and declarations of his mind, when you have ascertained what he did and said, it is not material to resort to what he would be likely to do and say. Lord Somerville's return to Scotland in 1745 is to be accounted for by the state of the country at that period. The first thing he did was to join the army. During the eighteen years he was in the army he was not once in Scotland, except, when his regiment was there. When he went there in 1763, and his father settled an annuity upon him, that was the only business, upon which he then went there. His next appearance there was, when he was sent for upon his father's illness; and his stay merely long enough to see him die. If Sir Charles Douglas quitting his country, and entering into a foreign service, changed his domicile, why did not Lord Somerville, entering into the British service? It is stated from the high authority of D'Aguesseau, that the reputed domicile of every great Lord in France is at Paris; unless he has in fact acquired one elsewhere. Lord Somerville certainly *had acquired none elsewhere. Serving his Majesty as a [*777] Briton, not as a Scotchman, why was not the original domicile got rid of? If he had expectations in Scotland, had he not also in England? The estate in England was much larger (1). But those circumstances ought not to have much weight in any case.

Then what passed after the death of the elder Lord Somerville? Immediately afterwards his son came to London. That was the moment, in which it was most natural to decide, whether he meant to be a resident Scotchman or an Englishman. In his father's life there was a strong indication of a purpose not to reside in Scotland; for his father's dying request to him was to live there during part of the year. The house in Scotland was then used only as a summer country-house, as most convenient for him. It does not appear, when he took the house in London. It is taken in the argument, and calculations are made upon that, as if it was only from 1778: but

(1) There was some difference in the statement as to this. The English estate was 1000*l.* a-year. The Scotch estate was stated to be now 2500*l.* a-year. On the other side it was said to have been at that time only 600*l.* a-year.

that is not a fair way of putting it. It was not in consequence of being elected one of the Sixteen Peers that he resided there. We find him appealing from the rates in 1773. That shows a probability, that he had a lease at that time; for they reduced him then from 90*l.* to 84*l.* a-year; just as they did afterwards. In 1769 he was residing there. He was extremely anxious to purchase the remainder of the term. As to the nature of his establishment, the quantity of furniture, &c., these questions never can turn upon such circumstances. All the writers upon the subject agree, that such circumstances are of no consequence, so that he has a permanent term in the house. Domat (1) says, it is the same, whether it is his own house or a hired one. It is manifest, why Lord Somerville stated to his friends in London, that he considered that house as a lodging house: a natural excuse for him to make: but we know it was not so, from the long term he took and the longer he wished to take. Next, as to his title-deeds: there is no evidence, that they were in Scotland; but it is natural to suppose, those of his Scotch estate were there.

The most important part of the case consists of the declarations of Lord Somerville, and the description of himself in the [*778] books of *the bank. Those circumstances are treated as slight: but they are considered most important by all the foreign lawyers; as superseding every other. Though the *Encyclopedie* is certainly not a book of authority, yet the rule as to what constitutes a domicil is distinctly laid down; and the authorities referred to. Pothier (2) speaks of it as the place, where he describes himself as residing in public acts; or to which he goes with his family, in order to keep Easter; and he goes on to say, that only where these circumstances are not to be found, where there is no declaration upon the subject, where it is in perfect *equilibrio*, you must have recourse to the original domicil. The expression "*Un menage*" is not to be translated into English. In the case of Mademoiselle De Clermont Santoignon, cited from Denisart (3), her change of residence was not alone sufficient to show, that she had changed her domicil. The decision was upon the acts she had done; describing herself as domiciled in Mayenne. The case of the Marquis De St. Paterre, cited from Cochin (4), is much stronger; who in deeds, that he had executed from 1704 to 1714, described himself as residing in the city of Mans, but only lodging at Paris: from 1714 to 1720 he had described himself sometimes as residing in the one, and sometimes in the other. Being equal therefore in that respect it is said, no inference could be drawn. But there was nothing farther in favor of the domicil at Paris; and there were other circumstances; showing, he considered himself as going to Paris from home. He kept a journal, entitled "*De mon voyage a Paris.*"

(1) Vol. ii. b. 1, tit. 16, s. 3, par. 5.

(2) Treatise on the Custom of Orleans, 10.

(3) Art. Domicil, No. 17.

(4) Vol. v. p. 1.

In the case of Mons. *De Courtaneon* (1) there was no decision; being referred, in order to know how he described himself in his public acts. Another case in *Denisart* (2) was decided entirely upon the party's description of himself. The case of the Duchess of *Hainault* (3) also turned entirely upon the same point. It was said there, as here, the broker might give any description. It is very material in the case of a common man to describe himself uniformly. But in none of Lord Somerville's letters and papers has he described himself with reference to Scotland; and as all the papers are in the possession of those resisting the English domicile, it may be assumed, that no such description is to be found.

* Then as to his declarations: certainly, when coupled [*779] with the fact, they are very material; and here are three witnesses unimpeached. The conversation with Colonel Reading as to the consequence of his living so little among them shows, he thought, they considered him as a foreigner. In summer Edinburgh is even more deserted than London. This shows his conscientiousness, that he was not living as a Scotch nobleman. The evitence of what passed with Sir James Bland Burgess is also very material. It is also a very important consideration, that his residence in Scotland was universally only during the summer months. It is held by authors of great authority, that a country residence will not change the domicile. Bynkershoek (4) states the case of a brewer at the Hague, who having one son by a deceased wife, hired a house near Leyden for the purpose of acquiring the inheritance of the son by the law of that place. He took the house for three years; and carried to it part of his furniture: but at the Hague he had the whole of his establishment. The distribution was determined to be according to the law of the Hague; and the reason given is, that at Leyden he was residing at a country-house. That applies strictly to this case. Lord Somerville was residing at his Tusculanum, as Bynkershoek calls it, *voluptatis causa in æstate*. It is impossible to ascribe his residence in London to any purpose but that of being a domiciled Englishman. The case referred to in D'Aguesseau of a residence of ten years being necessary to acquire a domicile in Brittany is quite out of the question. The reason given by Pothier is, that you can ascribe the residence to nothing but an intention to acquire a domicile. The inclination of the Court in all the decisions, that have taken place in this country, though it has not come to a rule, which is much to be lamented, has been to hold, that the domicile is in the capital of Great Britain, unless an intention to the contrary is shown. If with the strong circumstances, denoting Lord Somerville's intention to acquire a domicile in England, he should be held not to have a domicile in London, the law will be left in a state of more uncertainty even than at present.

(1) Coch. vol. iii. 702.

(2) Art. Domicil, No. 32.

(3) Coch. vol. ii.

(4) Quest. Jur. Priv. b. 1, c. 16, 185.

The *Attorney General*, [Sir John Mitford], in reply. This is one of the clearest cases in favor of the Scotch domicile; and if the Court decides against it, the consequence must be, that every Scotch nobleman coming to London for the winter will cease to be [*780] domiciled in Scotland. * In that respect the case is of infinite importance. It is to be decided not only upon the circumstances, but also according to the established rules of law; and there is infinitely more of law than of fact in these cases. The distribution is to be according to the law of that place, which for the purpose of succession is by the law of all countries to be considered the domicile. Using the civil law and the authority of text writers, we are frequently using what is no authority upon the subject of domicile, applied for many other purposes. I put out of consideration upon this question the *Lex loci rei sitæ*; against which there have been repeated decisions. That never was the law of any country farther than that there were some decisions in Scotland tending to that effect. The rule upon this subject is a rule of convenience, and an extent of convenience, which shows the necessity of adhering strictly to it; adopted throughout those nations of Europe, that had intercourse with each other, by a sort of comity between them, for obvious reasons. Most of them being founded upon the dissolution of the Roman empire had taken the text of the civil law as the principal ground of their decisions with regard to personal property; and from their feudal origin most of them had taken that law as the ground of their decisions with respect to real property. It is true, in the time of Justinian all the inhabitants of the empire had the freedom of the city: but at different times the decisions were according to the laws of those different countries. The Jewish law of succession differed much from the Roman; and this question without doubt would have depended upon the circumstance of the domicile in the estimation of the Roman lawyers. If the person was a citizen of one of the cities having the freedom of Rome, it would be according to the Roman law. If he continued a citizen of Jerusalem, then it would be according to the Jewish law.

The different nations of Europe have certainly taken the Roman law as their guide; and it is necessary for every Court to follow the same rule upon this subject of the succession to personal property. That foreign nations have not that idea of the *Lex loci rei sitæ* is particularly noticed by Lord Hardwicke in *Thorne v. Watkins* and other cases. Upon the same grounds in the Jersey cause (1) he refused to interfere upon property, happening to be in this [*781] * country: the representative being resident in Jersey and amenable there; and the bulk of the property being there. As to the cases upon the custom of London, in *Chomley v. Chomley* the circumstance of a capital mansion at York was not sufficient to prevent the distribution of a personal estate according to the custom

(1) *Pipon v. Pipon*, Amb. 25.

of London. The domicile for the purpose of offices and for the purpose of succession may be different; and so with reference to bearing charges and being assessed to taxes. By the French law that was considered very important; because it altered the assessment upon the other persons; which in 1663 produced a regulation, requiring, that changes of domicile should be registered. The domicile for the purpose of being amenable to justice was very important in France and other countries; where the Courts had limited jurisdictions. It was matter of stipulation, that for that purpose the domicile should be held to be at Paris or some other place. They distinguish the question for all these purposes. In these references therefore to those writers it is necessary to inquire the purpose. This qualification will make some of these quotations extremely different from what they are represented to be: the domicile not being treated of with a view to succession; and though a man may have several domiciles for these different purposes, for the purpose of succession he can have only one.

These are the simple and only rules of law. As to the circumstances, habitation is the principal ingredient; but it is not the only circumstance; and of itself it by no means constitutes the domicile; it must be of that description, which has the effect of establishing the party in that situation, contra-distinguished from any other situation, in which he has ever been. One clear and unquestionable rule is to be collected from all the text writers, and also as a matter of necessity; that the domicile of origin is the domicile of every person, until that is abandoned, and another gained. The domicile every child has on its birth must remain, until that is lost, and another acquired. Until another is acquired, that one cannot be lost. After the peace of 1783 such of the Americans as chose to remain in America, subjects of the States, ceased to be part of the British nation; and lost their character of Britons. So it is as to the domicile of origin; which must remain, until the party ceases to have it, and gains another. The intent to abandon it simply will not do; unless there is an actual abandonment, and the acquisition of another. This principle is fully *established by the [*782] cases in the House of Lords; for what could have raised the question, unless the domicile of origin remained, until it was abandoned, and another acquired. Mr. Bruce entered into the India service, not the King's service. A great deal turned upon that; for he was bound to reside in India; and could not reside elsewhere, except by the leave of the Company, and consequently for a temporary purpose. Therefore by entering into that service he was conceived to have abandoned his original domicile, and to have gained a new one. It did not depend upon the place, in which he lived in India. That was not inquired. It turned upon his residence in India under an obligation, that was to last during his whole life, unless put an end to. I confess, speaking individually, I think it would have been wiser to have held, that the domicile of origin remained; adhering to that rule; and that the act done ought not to

have been deemed to amount to an abandonment: the highest Court of Justice however was of a different opinion. But the whole case was founded upon the question between the domicile of origin and the new one. It is now said, the domicile of origin is a slight circumstance. In that case it was the whole, and in the case of Sir *Charles Douglas*. It is contrary to the articles of Union to say, his entering into the King's service was an abandonment; for the army is as much that of Scotland as England. But he entered into the Russian and Dutch services; abandoning, not only the Scotch domicile, but the English one. He partly made himself a subject of a foreign power; taking a qualified oath of allegiance in those countries (1). He married in Holland. Afterwards he had no residence in the world but at Gosport, no family establishment any where else.

In *Balfour v. Scott* there was an abandonment, if any thing can be called so. He sold all the furniture, except that of one room. He had no family establishment in Scotland of any description: it is even stronger than that; for he destroyed that, which he had there before. In the *Annandale* cause the Lord Chancellor expressly considers the domicile of origin, that of the father, as the whole argument for Lady Graham. Can the domicile of origin be now treated as nothing but a slight circumstance? Courts of Justice will be extremely unwilling to give up the rule as to that; a rule [* 783] of the greatest convenience; affording a point to *start from, something to decide in doubtful cases; according to the observation in the passage cited from the *Encyclopedie*; that, where there is any doubt, the party is always considered as having preserved his first domicile; a rule certainly of wisdom. If another domicile is gained, that in the same manner must remain, until abandoned. This is equally a rule of necessity. A man cannot be without a domicile of some description. The *dicta* to the contrary in some of the writers will prove quite unfounded. This is analogous to the principle we find in our own law. In the case of Wardship, for instance, a man might hold of several lords: then upon his death who was to have the wardship: supposing he did not hold of the King; who would be preferred? The rule is stated in *Fitzherbert's Natura Brevium* (2); that the heir shall be in ward to that lord, of whom he held by priority; but the tenant might, if he chose, change the priority by making a feoffment in fee and taking back an estate again. That rule was established for the purpose of convenience upon the principle, on which we are now contending.

Another rule with respect to the domicile of origin, which has been repeatedly insisted on, is that also cited from the *Encyclopedie*, that, where it is doubtful, which of two places is to be reputed the domicile, as if the fact of habitation is doubtful, and one appears to be the domicile of origin, that will turn the scale. But that must be

(1) The Master of the Rolls said, he had great doubt, whether that with the consent of His Majesty changes the domicile. See *Curling v. Thornton*, reported by Dr. Addams in his *Ecclesiastical Rep.* vol. ii. page 6.

(2) 333; 8th edit.

understood, where it cannot be clearly shown, that the domicil of origin continued the place of habitation; for if that remains the habitation to this extent, that there is no abandonment, that will remain the domicil. Where the question is between two places, both acquired, if one can be considered as properly the seat, it is to have the preference; and upon that the case of the Brewer at the Hague was decided, upon the distinction in Huber, that with reference to a citizen his domicil was, where his trade was carried on; and the country residence was to be considered as merely *voluptatis causa*; and the reverse as to a nobleman. Upon that distinction it was determined in that case, that the establishment at the Hague remaining, the domicil of the father was not altered by the residence at Leyden: nor consequently that of the son: yet the son lived and died there. That disproves the position, that the place, where the party dies, is to decide, if there is any *doubt. [*784] He was considered as living still under the protection of his father. In the *Douglas' Case* also the place where he died did not prevail. In considering the habits of different countries, as applied to this subject, and quoting the civil law, it must always be with a qualification; and that removes the objection, that the expressions of the civil law are not applicable. Family pictures may in some degree denote the family seat; and in this view may be considered as answering the Lares of the Romans. Upon comparison of the value of the effects at the two houses, it is evident, where the *summa rerum* was. Recollect the habit of these countries; feudal countries. The head of the Barony is always considered as the place where the Baron should be found; the place, where he was to be summoned. The Duke of Norfolk's seat must be considered to be at Arundel Castle; though his house in town is freehold. So Woburn is the duke of Bedford's. Those are the places, where they reside, when particularly in the character of Dukes of Norfolk and Bedford. The distinction between the eldest and the youngest sons is clear. The former must always look to the family seat, as that, which is to become his residence. The younger has no reason to look to that at all. The house in London was at first hired; and taking a lease afterwards is only another species of hiring. The mere object was the pleasure of indulging in winter in a town residence; not to establish a family mansion, but merely for convenience; it may be very truly said, *voluptatis causa*. There he had no regular establishment; and his declarations are the most positive; that he considered that house as a mere lodging house. It was a very just excuse to his friends. He could not see them there. He had not the means. He had no plate or other necessary articles. He must have given any entertainment at a tavern. It is said, that was the residence of his choice: the other descended upon him. But he did live in Scotland. It is said, his residence there was merely a point of duty from compliance with his father's injunction. It must however be shown, that he abandoned that: whatever inclination to London may appear. In all the other cases there was no

ticular place cannot in any degree affect the domicil. I have found no authority or *dictum*, that gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicil would follow that of his father. The domicil of origin is that arising from a man's birth and connections.

To apply these rules to this case. It cannot be disputed, that Lord Somerville's father was a Scotchman. He married an English lady; returned to Scotland; repaired his family house; occupying another in the neighborhood in the mean time; and he had apartments in Holyrood-House. For the first part of his life after his marriage he seems to have made Scotland almost his sole residence: nor was it contended, that during that period he had acquired any other. The father being then without doubt a Scotchman, the son was born; and at the age of nine or ten was sent into England for education, and from thence to Caen in Normandy. It cannot be contended, nor do I think it was, that during the state of pupilage he could acquire any domicil of his own. I have no difficulty in laying down, that no domicil can be acquired, until the person is *sui juris* (1). During his continuance in the military profession I have not heard it insisted, that he acquired any other domicil than he had before. Upon his father's death and his return to Scotland, a material fact occurs; upon which great stress was laid on both sides. It is said, his father's dying injunctions were, that he should not dissolve his connection with Scotland. In the subsequent part of his life he most religiously adhered to those injunctions. But it is said, that in conversation he manifested his preference of England; and that if it had not been for those injunctions of his father he would have quitted Scotland. Admit it. That in my opinion is the strongest argument in favor of Scotland; for, whether [* 788] willingly or reluctantly, whether from piety or from *choice, it is enough to say, he determined to keep up his connection with that country; and the motive makes not the least difference.

Then see, how after his father's death he proceeded to establish himself in the world. From that time undoubtedly he was capable of establishing another domicil. Until that time there could be no doubt, that the surplus of his personal estate must, if he had died,

(1) A domicil cannot be acquired by the act of the infant; but, with the exception of fraud, a domicil acquired by the surviving mother, becomes the domicil of the infant. *Pottinger v. Wightman*, 3 Mer. 67.

See upon the subject of domicil the references in the note, *ante*, vol. iii. 203. In *Curling v. Thornton*, in the Prerogative Court of Canterbury, Michaelmas Term, 1823, published by Dr. Addams, in his Ecclesiastical Reports, vol. ii. page 6, an attempt to establish a domicil in a foreign country against a Will, made in this country, failed; the original domicil not being completely abandoned; if a British subject can adopt a foreign domicil to the extent of completely abandoning his British domicil; and if a change of domicil can have the effect, beyond an alteration of the succession in the event of an intestacy, to annul a will, according to the law of the original domicil: propositions, considered by the Court (Sir J. Nicholl) as not sustained by authority, and doubtful on principle.

have been distributed according to the law of Scotland. Then, to trace him from that time. It appears, he had determined not to abandon his mansion-house : so far from it, he made overtures with a view to get apartments in Holyrood-House ; from which I conjecture, that, if that application had been granted, he might have been induced to spend more time than he did in Scotland. He came to London. I will not inquire, how soon he took a permanent habitation there : but I admit, from that time he manifested an intention to reside a considerable part of the year in London, but also to keep up his establishment in Scotland, and to spend as nearly as possible half of the year in each. He took a lease of the house, evidently with the intention to have a house in London as long as he lived ; with a manifest intention to divide his time between them. It is then said, there are clearly two domicils alternately in each country. Admit it : then the question will arise, whether in case of his death at either, that makes any difference. It was contended in favor of the English domicil, that in such a case as that, of two domicils, and to neither any preference, for it cannot be contended, that the domicil in Scotland was not at least equal to that in England, except the *lex loci rei sitæ* is to have effect, the death should decide. There is not a single *dictum*, from which it can be supposed, that the place of the death in such a case as that shall make any difference. Many cases are cited in Denisart to show, that the death can have no effect ; and not one, that that circumstance decides between two domicils. The question in those cases was, which of the two domicils was to regulate the succession ; and without any regard to the place, where he died. These cases seem to prove, and if necessary, I think, it may be collected, that those rules have prevailed in countries, which, being divided into different provinces, frequently afford these questions. The fair inference from them is, that, as a general proposition, where there are two cotemporary domicils, this *distinction takes place ; that a person not under an obli- [* 789] gation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country : on the other hand a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence^(a). It is not necessary to enter into that distinction ; though I should be inclined to concur in it. I therefore forbear entering into observations upon the cases of Mademoiselle De Clermont Santoignon and the Count De Choiseul, and the distinction as to the acts of the former, describing herself as of the place in the country.

The next consideration is, whether with reference to the property

(a) Where a person lived occasionally in two different towns, removing with his family, at certain seasons of the year, alternately from one town to another, it was held, that his domicil was in that town where he exercised municipal rights, and was subject to municipal burdens. *Harvard College v. Gore*, 5 Pick. 370.

or conduct of Lord Somerville there is any thing showing, he considered himself as an Englishman. It was said, for the purpose of introducing the definition of the domicile in the Civil Law, "*Ubi quis larem rerumque ac fortunarum suarum summam constituit*," that the bulk of his fortune was in England; and the description in the bank books was relied on. I lay no stress whatsoever on that description in those books or in any other instrument; for he was of either place; and was most likely to make use of that, to which the transaction in question referred. It was totally immaterial, which description he used. It is hardly possible to contend, that money in the funds, however large, shall preponderate against his residence in the country and his family seat. It is hardly possible, that should be so annexed to his person as to draw along with it this consequence. Upon nice distinctions I think it might be proved, that his principal domicile must be considered as in Scotland. Great stress, and more than I think was necessary, was laid upon the manner, in which he passed his time in each place. There is no doubt, the establishment in Scotland was much greater than that in London. In my opinion Bynkershoek was very wise in not hazarding a definition. With respect to that to be found in the Civil Law, the words are very vague; and it is difficult to apply them. I am not under the necessity of making the application; for my opinion will not turn upon the point, which was the place, where he kept the sum of his fortune. It is of no consequence, whether more or less money

was spent at the one place or the other; living alternately [* 790] *in both. Some time before his death he talked of making his will in Scotland. That circumstance is decisive, that his death in England was merely casual, not from intention (a). The case then comes to this. A Scotchman by birth and extraction, domiciled in Scotland, takes a house in London; lives there half the year; having an establishment at his family estate in Scotland, and money in the Funds; and happens to die in England. I have no difficulty in pronouncing, that he never ceased to be a Scotchman: his original domicile continued. It is consistent with all the authorities and cases, that, where a man has two domiciles, the domicile he originally had shall be considered his domicile for the purpose of succession to his personal estate, until that is abandoned, and another taken.

It is surprising, that questions of this sort have not arisen in this country, when we consider, that till a very late period, and even now for some purposes, a different succession prevails in the Province of York (1). The custom is very analogous to the law of Scotland. Till a very late period the inhabitants of York were restrained from disposing of their property by testament. The alteration may account for the very few cases occurring; for very few

(a) Upon a question of domicile, the declarations of the party whose home is in controversy, made at the time of going or returning, may be received as evidence of his intention. *Gorham v. Canton*, 5 Greenl. 266.

(1) 4 Burn's Ec. Law, 364.

persons of fortune die intestate; though it has happened in this case. Before that power of disposing by testament such cases must have been frequent; and the question then would have been, whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of York, coming to London for the winter, and dying there intestate, the disposition of his personal estate should be according to the custom or the general law. One should suppose it hardly possible that some such case had not occurred. I directed a search to be made in the Spiritual Court and the Court of Chancery; where it was most likely that such a case would be found: but I do not find that any such case has occurred. Some observations may arise upon that custom. It may be thought there are some inaccuracies in the words of the Statute (1) upon it. The custom (2), as it is stated to have existed, is thus expressed; that there is due to the widow and to the lawful children of every man being an inhabitant or householder within the said Province of York and dying there or elsewhere intestate, being an inhabitant or householder, within that Province, a reasonable *part of his clear movable goods; unless such [*791] child be heir to his father deceased, or where advanced by his father in his life-time; by which advancement it is to be understood, that the father in his life-time bestowed upon his child a competent portion whereon to live. I observe, the Statute giving the power of disposing by testament, after reciting the custom, directs, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the Province of York, to give, bequeath, and dispose of all their goods, chattels, debts, and other personal estate. One would suppose from this, that the Legislature had some reference to the *lex loci rei sitæ*; and that it was supposed, the custom would attach upon any property locally situated there; though the party was not resident; and though it is now too late to doubt the law upon that, I have some reason to think, our Spiritual Courts inclined, as the Courts of Scotland, to the *lex loci rei sitæ*: and if the question had occurred in that Court, and the authority of the House of Lords had not interfered, that would have been considered as the rule; and for this reason; that their jurisdiction is founded upon it: the distribution arising from the place, where the property is situated; and it is natural for the Judge, who acquired his authority from the situation of the property, to suppose, the rule should be that of the place, where the property is. But that now certainly is not the case.

I shall conclude with a few observations upon a question, that might arise; and which I often suggested to the Bar. What would be the case upon two cotemporary and equal domicils; if ever there can be such a case? I think such a case can hardly happen: but it is possible to suppose it. A man born, no one knows where, or having

(1) 4 Will. & Mary, c. 2.

(2) 2 Burn's Ec. Law, 750.

had a domicil, that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances: both country houses, for instance, bought at the same time. It can hardly be said, that, of which he took possession first, is to prevail. Then, suppose he should die at one: shall the death have any effect? I think, not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country, in which the property is, would not let it go out of that, until they know by what rule it is to be distributed. If it was in this country, they would not give it, until it was proved, that he had a domicil somewhere.

[* 792] * In these causes I am clearly of opinion, Lord Somerville was a Scotchman upon his birth; and continued so to the end of his days. He never ceased to be so; never having abandoned his Scotch domicil, or established another. The decree therefore must be, that the succession to his personal estate ought to be regulated according to the law of Scotland.

SEE the notes to *Bempde v. Johnstone*, 3 V. 198.

WRIGHT v. HUNTER.

[ROLLS.—1800, FEB. 5; 1801, FEB. 24.]

MONEY paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore a payment by the other on the same account after the bankruptcy cannot be recovered from the bankrupt; who had obtained his certificate: but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose; and the whole was recovered in an action against the bankrupt, who had obtained his certificate; the Defendant not having pleaded in abatement.

Though contribution among partners is now enforced at law, the jurisdiction of Courts of Equity is not ousted; (a) and therefore though the bill was dismissed, the object having been obtained in an action directed, the Court would not dismiss it with costs, [p. 792.]

ROBERT HUNTER, Margaret Hunter and Henry Keowen Hunter, who were copartners in business in equal shares, were in 1791 concerned with the Plaintiff in a ship: the Plaintiff being entitled to six twenty-fourth shares; and the Hunters to eighteen twenty-fourth shares. On the 8th of February, 1793, the Plaintiff settled the account of the outfit of the ship and cargo with Robert Hunter for himself and his partners; who were also, pursers and husbands of

(a) See Story, Partnership, § 320, 321, 322; Collyer, Partnership, (2d Am. ed.) 154-157; 1 Story, Eq. Jur. § 496, 504; *Sells v. Hubbell*, 2 Johns. Ch. 397; 1 Madd. Ch. Pr. (4th Am. ed.) 197, 233; *Chichester v. Vass*, 1 Munf. 96.

the ship; and the Plaintiff then paid to the Hunters the sum of 782*l.* 19*s.* 2*d.*; which was his proportion of the charge. On the 9th of October, 1793, the Hunters became bankrupts; and at that time the sum of 1638*l.* 8*s.* 8*d.* remained due on account of the outfit and cargo of the ship. After the bankruptcy it came out, that the Hunters had sold eleven twenty-fourth shares without the knowledge of the Plaintiff; and by agreement subsequent to the bankruptcy the debt of 1638*l.* 8*s.* 8*d.* was apportioned among the several owners; and the Plaintiff paid his proportion; amounting to 409*l.* 12*s.* 2*d.* The Hunters' share under that apportionment not being paid was subdivided among the other owners; and the Plaintiff also paid 168*l.* 13*s.* 4*d.*, his proportion upon that division.

Robert Hunter having obtained his certificate, the bill was filed against him for the purpose of being relieved against those payments made by the Plaintiff after the bankruptcy.

Mr. *Graham* and Mr. *Richards*, for the Plaintiff compared it to the case of a surety; and mentioned *Toussaint v. Martinant* (1).

* Mr. *Piggott* and Mr. *Cooke*, for the Defendant objected, that the assignees of the bankrupts and the other part-owners ought to be parties, for the purpose of ascertaining the contribution: but as, to avoid that difficulty, the Plaintiff goes only for these two liquidated sums, he can enforce that demand at law; to which he ought to have resorted after obtaining the discovery by the answer.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] intimated an opinion, that the demand of 409*l.* 12*s.* 2*d.* was barred by the certificate; and said, that though this might be the subject of an action, a bill in Equity would also lie: but he would not without a trial at law determine this point; that a partnership creates an agreement, that in case any partner pays more than his share, the others shall indemnify him: a very important consideration in case of a bankruptcy; and the creditor, though he cannot come directly, may in that way come circuitously against the bankrupt by demanding it from the other partner first.

The case upon this went to the Court of King's Bench; where it was decided, that the action could not be maintained as to the sum of 409*l.* 12*s.* 2*d.*; but that the Plaintiff was entitled to have judgment for the other sum of 168*l.* 13*s.* 4*d.* (2).

When the cause came on again after that decision, the only question was as to the costs.

Feb. 24*th.* Mr. *Richards* for the Plaintiff insisted, that the bill should be dismissed without costs: the jurisdiction of this Court not being ousted; though actions are now maintained for a contribution between partners.

(1) 2 Term. Rep. B. R. 100.

(2) See the Report of the case in the Court of King's Bench, 1 East, 20; where the circumstances are more fully stated than is necessary upon this occasion.

Mr. *Piggott* and Mr. *Cooke* for the Defendant contended, that the bill should be dismissed with costs; that all the relief was at law; and the object was to avoid paying for the discovery according to the usual course of the Court.

The MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN].

Though actions between partners for a contribution have [*794] been frequent of late, formerly that was always *the subject of a bill. I feel a little difficulty upon your getting the costs at law; which you must have according to the course of the Court. I am clearly of opinion, there was ground enough for bringing this bill originally upon this partnership transaction. I would not lay down, nor have it understood, that, because Courts of Law may entertain actions upon such subjects, a party may not file a bill for contribution. Suppose, there are ten persons all bound to contribution: a bill in this Court would be much the shortest course. There may be doubts as to their proportions. This is a very hard case upon the Plaintiff; and no favor is due to the Defendant. In *Stevens v. Praed* (1) a bill for a legal demand was retained, with liberty to bring an action: the assistance of the Court being required upon equitable circumstances. Though I thought this question more proper to be tried at law, the Plaintiff was very well justified in coming for a contribution; for certainly this Court has never given up its jurisdiction.

The bill was dismissed without costs.

1. THE 52d section of the consolidated Bankrupt Act, 6 Geo. IV. c. 16, (which said 52d section embodies the substance of the 8th section of the previous statute of 49 Geo. III. c. 121,) enables all persons liable for any debt of a bankrupt, to come in under his commission, after they have discharged such debt, although they may have paid the same after the commission issued. That this was the course which the solvent partners, in the principal case, ought to have pursued; and that by omitting it they lost their sole remedy as against the bankrupt; see *Wood v. Dodgson*, 2 Mau. & Sel. 201; see also *Ex parte Yonge*, 3 V. & B. 40.

2. Whenever of several parties all equally liable to a debt, one has paid the whole or more than his due proportion, contribution may be decreed in Equity; *Rogers v. Mackenzie*, 4 Ves. 752; for it by no means follows, that because a plaintiff has a legal right he may not sue for it in Equity, when the question is mixed up with equitable circumstances; see, *ante*, the note to *Stevens v. Praed*, 2 V. 519.

(1) *Ante*, vol. ii. 519.

POCOCK v. REDDINGTON.

[ROLLS.—1801, FEB. 25.]

EXECUTOR and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, the *cestuys que trust* have an option to have the stock replaced, or the money produced by the sales with interest at 5 per cent., or more, if more has been made by it, (a) and the costs occasioned by his misconduct. (b)

JOHN POCOCK by his will, dated the 4th of July 1775, after giving his wife an annuity of 50*l.* a-year for her life in bar of dower, and several legacies, devised all his freehold estates to Charles Meaden and William Reddington and their heirs, to the use of them, their executors, &c. for ninety-nine years; remainder to the use of his daughter Mary and all and every such other child and children as he might have by his wife, their heirs and assigns, as tenants in common; remainder over. The trust of the term was to receive the rents and profits, and pay the annuity, and to apply the surplus rents as the trustees should think proper, for the education and maintenance of the testator's children, until they should respectively attain the age of twenty-one; and that the trustees should during the minority of such child or children increase and improve the residue of such moneys by placing the same out at interest, as the trustees should see occasion, and divide such residue and increase between the children or the survivors * of them equally at the age of [*795] twenty-one. The testator gave all the residue of his personal estate to the same trustees, upon trust to convert his effects into ready money, and place the same out at interest at their discretion; and to apply the interest or yearly produce, or such part thereof as they should think proper, for and towards the education and maintenance, benefit and advantage, of his children during minority; and afterwards to dispose of the residue of the interest and principal among the persons and in the manner directed as to the residue of the rents and profits of the real estates; after education, &c. The will contained the usual direction, that the trustees should retain and reimburse themselves all costs, damages and expenses, which they should sustain by reason of the trust; and that neither should be answerable for the acts of the other; but each for his own acts only. The trustees were appointed guardians and executors.

The testator died in 1787; leaving his wife and two children, Mary and another daughter, surviving. Meaden died in the life of the testator.

The bill was filed in 1797 by the testator's widow, his eldest

(a) 2 Story, Eq. Jur. § 1263; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; 2 Stephens, N. P. 1862, and note (30), 1863, 1864; *Pride v. Fooks*, 2 Beavan, 430.

(b) As to costs, *Newton v. Bennet*, 1 Bro. C. C. (Am. ed. 1844,) 362, notes (3 & a); 2 Williams, Executors, (2d Am. ed.) 1463, 1464; 2 Barbour, Ch. Pr. b. 6, ch. 3, § 1, pp. 329, 330; *Howard v. Rhodes*, 1 Keen, 581; *Manning v. Manning*, 1 Johns. Ch. 535; *Sammes v. Rickman*, ante, 2 V. 36, note (b).

daughter Mary Fuller, who had attained the age of twenty-one, and on behalf of the younger daughter, still an infant, against the surviving trustee; charging him with a breach of trust both as to the real and personal estates, by cutting timber and dealing with the property for his own benefit.

The Defendant by his answer stated, that he sent to the Plaintiffs a book of accounts relating to his trusteeship and executorship; which they returned; expressing themselves perfectly satisfied. He admitted, that the sums of 2418*l.* 16*s.* 9*d.*, 1100*l.*, 1000*l.*, and 14*l.* 10*s.* 6*d.* Bank 5 per cent. Annuities were then standing in his name; and that 6800*l.* had been purchased with the testator's estate; that in 1790 he quitted his business as a grocer; and about March 1793 entered into partnership with Richard Jesson Case as a wine merchant.

By his answer to the amended bill he stated, that the purchases of stock were partly with the testator's property, and partly with his own; that he had no memorandum or account of the transactions of the sales or transfers of the stock; that upon the 2d of [*796] * November 1790 he sold out and transferred to William Poppleton 1650*l.* 5 per cent. Bank Annuities, and 2650*l.* to Richard Jesson Case upon the 23d of March 1793: notwithstanding which he still debited himself with the dividends of the whole trust stock; as if he had received them. Poppleton and Case failing, the sums transferred to them were lost, except a trifling dividend received from their estates. He farther stated, that he sold the trust stock with his own; and kept no account of the sales or transfers; and therefore is unable to set forth the particular times.

By the decree, pronounced upon the 5th of July 1798, an account was directed of the personal estate and of the rents and profits of the real estate received by the Defendant, and of the timber felled; and an inquiry, whether he had invested any other part of the testator's estates in Government or any other and what securities, and sold the same, and at what prices, &c.

The Master's Report stated, that the Defendant had at different times invested several sums, part of the testator's estate, in 5 per cent. Annuities; and had also purchased in the same Fund with his own money. Upon the 31st of July 1793 the sum of 8150*l.* was standing in his name. He sold out at different times; and received 8797*l.* from the sales. The several sums of 600*l.* 500*l.* and 500*l.* were purchased with his own money. The sum of 7056*l.* was the purchase money received by him for the stock produced by the testator's property. He began to lay out money in the funds in 1788; and continued to do so to the 31st of January 1793; and he sold out during the period from 1788 to 1794. Having replaced stock of the value of 3436*l.* 5*s.* 3*d.*, he was charged with the balance of 3619*l.* 14*s.* 9*d.* The Report farther stated, that a balance was due to the Defendant on account of the real estate; and the balance against him as to the personal estate was 1049*l.* 10*s.* 2*d.*

Exceptions were taken by the Defendant to this Report. The

him with all the costs. He blended the trust money with his own ; and made it almost impossible to follow and separate it ; keeping no memorandums for that purpose. Can it be said, that without this suit he would have done any justice to these parties ? In such cases the Court always charges the trustee with the costs of the suit and the highest rate of interest ; and no greater mischief can be done than relaxing that rule. Till the bill was filed no account could be obtained ; and the account now given was not produced until the bill was amended : his first answer, instead of a full and fair account, merely affording materials for amending the bill. It is enough, that from the moment of the testator's death the Defendant began to deal with the property with a view to make advantage of it. From that moment he was guilty of misconduct in his trust ; which has occasioned this suit. The dates show, he would have made a great advantage by his transactions in the Funds, if he had not lent money to Poppleton and Case. That circumstance also is sufficient to charge him with costs ; changing the security from good to bad ; and putting one sum upon the least security he could obtain, a note of hand.

Mr. Romilly, and Mr. Johnson, for the Defendant, the Trustee. This was a very troublesome trust. These two children were educated by this Defendant with great care from their father's death. Nothing can be imputed to him but one very indiscreet transaction ; in consequence of which the Plaintiffs will make a great profit, if the money is to be replaced in the Funds. There is no instance of charging a trustee with interest and costs, where he has sustained an actual loss ; as in this case. No advantage, but very great disadvantage, will arise from holding trustees to the very strict rules now recommended. He states, that he did send them an account, with which they were satisfied. That book contains an account of all the stock, that was bought, except two sums of 100*l.* and 150*l.* That book was returned to him with an answer, that they were perfectly satisfied with the accounts. He never sold out with a view to gain money ; but merely upon those two occasions, the loans to Poppleton and Case, to employ the money in another way ; and he intended to replace those sums. It appears now, that [*799] he cut down the timber, *because it was decaying, and with the advice of the mother and all the family. That, which was the principal object of the bill, is now abandoned. Unquestionably therefore he is not to pay the greater part of the costs.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. The case is literally this. The bill is filed by the widow and two children, calling upon this executor and trustee for an account as to the real and personal estate. The bill originally charged him with misconduct in the trust as to the real estate by cutting down timber ; from which charge he has exculpated himself ; and no decree was prayed as to that. There is no foundation therefore for that part of the bill. With respect to the other part, the account as to the per-

The question then is, whether he is to pay any and what part of the costs. It is scarcely possible to suppose, hard as it may be, that I can permit him to have his costs. The only point can be, whether he is to pay any part of the Plaintiff's costs. It would be injustice to make him pay the whole; for one part of the bill has failed; and it will, I think, be sufficient to satisfy justice, if he pays that part of the costs relating to this transaction only; considering his severe loss and the gain of the *Cestui que trust*. That will be sufficient with a view to protecting the public from such conduct in future; which is all I am called upon to do.

Over-rule the exceptions. Refer it back to the Master to review his report as to the account; and, instead of charging the Defendant with the dividends, charge him with the several sums of money received by the sale of the stock from time to time, with interest at 5 per cent. from the times, at which they were respectively received. Tax the Plaintiffs their costs, to be paid out of the testator's estate; and let the Defendant, the executor, pay the costs of this cause, as far as relates to the transaction of buying and selling the stock, and the costs of the amendments (1).

As to the general principles recognized in the principal case, see, *ante*, the note to *Earl Powlett v. Herbert*, 1 V. 297, and note 2 to *Wilkinson v. Stafford*, 1 V. 32; but that the regular time for directing such inquiries as were here ordered at the first hearing, is not until the cause comes on for farther directions; see *Law v. Hunter*, 1 Russ. 105.

Brown v. Vinyard, ib. 460; *Lafont v. Riccard*, ib. 487; *Chemut v. Strong*, 2 Hill, Ch. 150; *Thomas v. Fred. Co. School*, 9 Gill & J. 115; *Arnett v. Linney*, 1 Dev. Eq. 369; *Fowler v. Garret*, 3 J. J. Marsh. 681; *Manning v. Manning*, 1 Johns. Ch. 527; *Franklin v. Frith*, 3 Bro. C. C. 433; *Tew v. Earl of Winterton*, *Forster v. Forster*, *ante*, 1 V. 451, note (c).

(1) In *Long v. Stewart*, in Chancery, 13th March, 1801, also a case of a breach of trust by selling out stock, the Lord Chancellor expressed a similar opinion upon both of these points; the option of the *Cestui que trust* to have the stock replaced or the produce with interest, and at the rate of 5 per cent. The Defendant being representative of the trustee, who was dead, an inquiry was directed, whether the Defendant possessed assets.

these points were brought on without any exception to the report. The Master of the Rolls proposed an inquiry as to the jewels : but both parties pressed for the opinion of the Court on an affidavit of the facts, and that a paper in the hand-writing of the late Lady Ferrers was found among the papers of the testator, containing the following words :

“ I suppose, you will secure the diamond ear-rings and five pins and my Mocco watch to R. S. Shirley our grandson for his wife so that they cannot be worn by any body else as those that were mine you will do as you please.”

It was said, a reference could not produce any farther evidence. All the debts were paid by a sale of part of the real estate : the personal estate not being sufficient ; and there was some surplus ; out of which the legatees claimed to be reimbursed.

Mr. *Romilly* and Mr. *Stratford*, for the Defendant Lord Tamworth. This is a question, not with creditors, but between specific legatees. There is clearly an implied gift of these jewels. Why does the testator make this exception ? He declares the reason ; and that is equivalent to a declaration, that they shall go to his grandson. *Poulson v. Wellington* (1). *Bibin v. Walker* (2). *Ramsden v. Hassard* (3). Though this will is very inaccurate, the intention is clear.

Mr. *Richards* and Mr. *Stanley*, for the other Defendants, Legatees. The testator clearly makes a distinction between two sets of jewels. All his jewels he gives with the residue of his personal estate. Then he makes the exception of his Opera shares, &c. ; and in that he only describes the other jewels, as those, which Lady Ferrers desired to be given to their grandson, subject to that condition. He does not give them ; and afterwards he uses the words “ in my will or my codicil ; ” which shows he intended a farther disposition : and the exception is with a view to that. The Opera shares and furniture do not pass ; and the jewels are in the same exception.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I was at first inclined to think, these jewels passed to Lord Tamworth : but my opinion is a good deal changed upon the [* 803] other words. If there was a single article *excepted, and this reason given, there would be some argument : but here are other things ; which are clearly not disposed of.

Mr. *Romilly*, in reply. Even considering those other words, it is clear, the testator intended to give these jewels to Lord Tamworth. He gives no reason for excepting two of three articles ; and he does give the reason for excepting the third. The effect of that reason is not at all weakened by his silence as to the other excepted articles. These jewels were all the jewels he had. That was established before the Master. He had no jewels but what his wife had worn in her life, and which she desired might go to the

(1) 2 P. Wms. 533.

(2) Amb. 661.

(3) 3 Bro. C. C. 236.

and from which I never will depart, I would not raise them. *Calthorpe v. Gough* (1) *Mellish v. Mellish* (2), and a very late case of *Phillips v. Price*, are cases, in which no one could doubt: but it must be remembered, that a Judge in Equity is not more at liberty to raise inferences than a Court of Law. He must not say what he supposes the testator meant, but what the testator has said. Consider what would be the case in a Court of Law. Suppose, a testator devised all his estates to his second son, (not the eldest; for then there would be a necessary inference) except a particular estate; which his wife desired he would give to his third son: could a Court of Law say, that amounted to a disinherison of the eldest son? The question would be, whether, * be- [* 806] cause he had given all his estate to his second son except one, and mentioned his wife's desire, that he would give that to his third son, therefore he meant to give it to him. If he had given all to the eldest son, with that exception, that would be like the great case (3), that every one has in his mind, of a devise after the death of the devisor's wife to a person, not his heir at law. A private man would say undoubtedly, that he must have intended, his wife should take for her life: but Courts of Law have always said, they cannot in that case make the inference, that, if the devise after the death of the wife was to the heir at law, they would make.

Under these circumstances I must hold, that this omission in this will is not necessarily to be supplied. There is only a declaration, that the testator had not brought himself at that time to give away these jewels: but there is not a sufficient ground for me judicially to declare, that he had disposed of them to his grandson by his will (4).

The point as to the claim of the Journals of the House of Lords was not determined: but the Master of the Rolls intimated an opinion, that Lord Ferrers was entitled to them; observing, that a Bishop gives a receipt for the Journals for his See; and upon the death of a Peer the subsequent volumes only are delivered to the next Lord.

1. THAT wherever there is a written contract for money, payable on demand, or upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment; see, *ante*, the note to *Parker v. Hutchinson*, 3 V. 133.

2. In the construction of a will, implication must never prevail, where such implication is not a necessary one; see notes 1 and 2 to *Holmes v. Cradock*, 3 V. 317, and the farther references there given. As to what degree of implication amounts to "necessary inference," (as those words are used in ordinary legal phrase,) see note 3 to *Brimmel v. Prothero*, 3 V. 111; and with respect to the implication which arises from a devise to the testator's heir at law, after a life estate given to another person; see note 4 to *Dashwood v. Peyton*, 18 V. 27.

(1) 3 Bro. C. C. 395, n.

(2) *Ante*, vol. iv. 45.

(3) 13 Hen. VII. Vaugh. 263, *Gardner v. Sheldon*. Where the devise is to the heir and others, *Quære*: *Dyer v. Dyer*, *post*, vol. xix. 612; 1 Mer. 414.

(4) *Ante*, *Wainewright v. Wainewright*, vol. iii. 558; *Phillips v. Chamberlaine*, iv. 51, and the note, 59.

KING v. TAYLOR.

[ROLLS.—1801, MARCH 2, 4.]

A CLAUSE of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting. (a)

ANN REEVES by her will, after directions concerning her funeral, &c., proceeded thus:

"2dly: I give and bequeath to my dearly beloved son John Charles Reeves when he has attained the age of twenty-three 150*l*. Stock in the 5 per cent. Navy Annuities being a joint Stock in the names of Ann Reeves and Thomas Foster and likewise 350*l*. Stock in the 3 per cent. Reduced Annuities in the aforesaid [* 807] * names likewise all my household goods plate and china that I shall be possessed of at my decease likewise the box of linen and plate which is at Mr. Taylor's West Smithfield.

"3dly: I give and bequeath to my dearly beloved daughter Ann King wife of James King now living at Beverley in Yorksire all my wearing apparel likewise 50*l*. Stock in the 5 per cents. aforesaid and likewise 350*l*. Stock in the 3 per cent. Reduced Annuities being a joint stock in the names of Ann Reeves and Thomas Foster and I do desire that the 50*l*. in the 5 per cent. and the 350*l*. Stock in the 3 per cent. which I bequeath to my daughter if her husband be living be transferred to my daughter Ann King and to Mr. Joseph Taylor of West Smithfield in the parish of St. Sepulchre's London and to Mr. Thomas Foster of Oxford Arms Passage in the parish of Christ-Church Newgate Street London I do nominate and appoint the above Joseph Taylor and Thomas Foster in trust with my daughter for the aforesaid 400*l*. Stock with the interest to be managed for her benefit as they three shall agree to her advantage I give and bequeath whatever interest may be due to me jointly between my aforesaid two children *Item* I give and bequeath to the above Joseph Taylor and Thomas Foster 1*l*. 1*s*. each for a ring *Item* I do and will ordain that if either of my children should die the surviving shall have what I have left to the other."

The testatrix then appointed Foster her executor. She died soon after the execution of the will. Ann King survived her; and died on the 9th of March, 1800. The bill was filed by her husband and administrator, claiming the remainder of the 400*l*. Stock bequeathed to her; the trustees having in 1795 sold out part, and paid the money to Ann King at the desire of her and the Plaintiff.

The Defendant John Charles Reeves, as having survived his sister, claimed her share under the will.

Mr. Piggott and Mr. Cox, for the Plaintiff. This legacy was a

(a) See 2 Williams, Executors, (2d Am. ed.) 904, 905; *Slade v. Milner*, 4 Madd. 129; *Howe v. Pillans*, 2 My. & Keen, 20, 21; *Crigan v. Barnes*, 7 Sim. 40; *Lord Douglas v. Chalmer*, ante, 2 V. 801, note (a); *Billings v. Sandom*, 1 Bro. C. C. (Am. ed. 1844,) 394, notes.

vested interest in the Plaintiff's wife ; and upon the whole will the clause of survivorship must be taken to refer to the event of death in the life of the testatrix, in case of a lapse. The words creating the survivorship are general, not confined to the stock only. The *effect therefore must extend to the other articles ; the linen, wearing apparel, china, and plate. It is impossible to say, they were intended to be used only, without any absolute interest in them till the death of one of the children. It is not likely, that the testatrix would have fixed the age of twenty-three in the bequest to the Defendant, if she intended, each child should have only the interest till the death of one of them. The case of *Trotter v. Williams* (1) decides this. The Court always look to the whole will ; considering the words "if, when, in case of," &c., as equivocal, and determining very little : *Lord Douglas v. Chalmer* (2) ; and where they are held to import a condition, it must be confined to a certain time.

Mr. *Hart*, for the Defendant. The Court cannot go out of the particular clause, upon which the Defendant's claim is founded, without rejecting perhaps the only passage in the will, that is clear, definite, and distinct. This testatrix intended as equal a distribution between her children as might be : this stock constituting the whole of her property except wearing apparel, &c. The bequest to the daughter clearly shows this at least ; that her husband was to have nothing to do with the property. He is totally excluded from any interest in it. The Court cannot give this property to the Plaintiff without rendering that clause wholly nugatory. In *Trotter v. Williams* the whole context clearly pointed to the case of a lapse. In this will there is nothing in favor of such an inference.

Mr. *Piggott*, in reply. The only difficulty arises from the words of survivorship : all the rest being perfectly clear. If the Defendant's construction is right, then he would not have taken at the age of twenty-three absolutely, but only the dividends of the stock during his whole life, till the event of the survivorship should be decided : but without doubt he was intended to take absolutely at that age. It is equally impossible to reconcile their construction with the gift to the daughter, and the power to manage the property for her advantage. How can that be consistent with the intention, that she shall have only the interest ? Her marriage was clearly the only event, in which the testatrix meant it to be secured. In *Lord Douglas v. Chalmer* there was a *view to the children of [*809] Lady Douglas ; and the Lord Chancellor went on the ground, that he must have rejected all consideration of the children by giving her the absolute interest. In this will there is no view to the Defendants of either the son or daughter.

The MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN]. I am much inclined to think it impossible to raise any judicial doubt

(1) Pre. Ch. 78.

(2) *Ante*, vol. ii. 501, and the note, 507.

upon this case ; for repugnances would arise from the construction of the Defendant. This is perfectly distinguishable from all the cases, upon the words "in case of, if it should happen," &c. ; for here is a specific time pointed out, at which it appears evidently to be the intention, that the legatee should be put in complete possession of the legacy ; which must be expunged, and declared not to operate to any intent whatsoever, and to have been put in for no purpose, upon the Defendant's construction. The disposition in favor of these children preceding that clause is without any limitation, or intimation, that they are to be prevented from the full enjoyment of it ; or, that if either should die leaving children, that share should not go to them, but to the survivor. Then comes this clause. I do not recollect, whether these precise words "if either of my children should die" have occurred. *Trotter v. Williams* is in favor of the Plaintiff: the other cases, as far as they have gone, are with the Defendant. I do not agree with the argument for the Defendant in distinguishing this case from *Trotter v. Williams*. It is directly in point ; and almost exactly the same as the present. But subsequent cases have occurred ; in which words very similar to these have been confined to the death of the party. The first case is *Billings v. Sandom* (1) ; upon which there could be no other construction than that put by Lord Thurlow. There was nothing upon the face of the will to restrain it to dying in the life of the testator, to prevent a lapse ; which will not be supposed the intention, unless there can be no other.

The next case is *Nowlan v. Nelligan* (2). The words in these cases are not "if he should die," which is a very extraordinary condition to creep into any will, but "in case of his death ;" which has more reference to the time than the other expression. These cases were much relied upon in *Douglas v. Chalmer*, the last case upon this subject ; which was determined by the Lord Chancellor ; * who upon a rehearing adhered to his opinion. His

Lordship's reasons certainly do not apply to this case : 1st, What was naturally to be considered the intention : 2dly, the consequence of the construction contended for would have been to give the absolute interest to Lord Douglas ; for there was no qualification, restraining it to the separate use ; and the children were evidently the fixed objects of the benevolence of the testatrix. The words in that will did not naturally mean a given time : and the general intention most probably would be better effectuated by the contrary construction than by adding to it, and inferring those words. The Lord Chancellor after considering all the cases continued of the same opinion ; shows, how the case of *Lord Bindon v. Lord Suffolk* (3) applied to a different subject ; and says, in *Trotter v. Williams* the construction was inevitable ; and it was only providing against

(1) 1 Bro. C. C. 393.

(2) 1 Bro. C. C. 489.

(3) 1 P. Wms. 96. See, *ante*, *Brograve v. Winder*, vol. iii. 634 ; *Russell v. Long*, iv. 551, and the authorities there referred to, and the note, ii. 267.

a lapse. It was no more so there than in this case. I say the same here. The legacy of the Defendant vested at the age of twenty-three; and it would be totally inconsistent to make that an interest for life only, and to expunge what precedes these blind words. The Lord Chancellor then comments upon *Nowlan v. Nilligan*; and concludes, that upon the will before him Lady Douglas took only an interest for life.

This case comes up to *Trotter v. Williams*; and is by no means affected by either the decisions or the reasoning of the other three cases; and the ground of my decision is, that the construction, that these words mean, whenever the death of either shall happen, would be totally inconsistent with the rest of the will. The conclusion is, that there was an absolute interest in the daughter at the death of the testatrix; and in the son at the age of twenty-three; and as to the former it is put into the hands of trustees by words, the construction of which must be, that it is to her separate use.

Declare, that the legacy to Ann King became a vested interest in her to her sole and separate use; and it being admitted, that the trustees had transferred to her and her husband 200*l.* 3 per cent. Annuities in her life, let them transfer the remainder of the stock bequeathed to her according to the prayer of the bill; and let all the residue be transferred to the son. The costs must come out of the fund in moieties (1).

SEE the note to *Lord Douglas v. Chalmers*, 2 V. 501; and notes 2, 3, and 4 to *Perry v. Woods*, 3 V. 204.

WILDE v. HOLTZMEYER.

[* 811]

[ROLLS.—1801, MARCH 4.]

CONSTRUCTION of a very inaccurate will, that the words "and all I am possessed of" were confined to a specific bequest of stock immediately preceding; meaning all interest in that fund; and did not comprise the general residue; which was by a subsequent clause expressly disposed of in a different manner.

The words "all I am possessed of" in a will in legal construction relate to the time of the death, not of the execution of the will; unless explained, [p. 816.] Same sense to be given to every part of a will, if consistent with other parts: the legal sense, if possible, (a) [p. 818.]

JOHN WOLRATH HOLTZMEYER, a German residing in this country, by his will, dated the 25th of April, 1791, after the usual introduction, proceeds thus:

"And as for such worldly estate and effects which I shall be pos-

(1) *Hinckley v. Simmonds*, ante, vol. iv. 160.

(a) *Sims v. Doughty*, ante, 243, note (d), and cases cited; *Daves v. Swan*, 4 Mass. 208; *Parsons v. Winslow*, 6 Mass. 169.

If any word or expression has no intelligible meaning, or be absurd, or repugnant to the clear intent shown in the rest of the will, it may be rejected. *Bartlet v. King*, 12 Mass. 537, 542; *Id. v. Id.*; 5 Mass. 500.

seessed of or entitled unto at the time of my decease I give and bequeath unto my son Henrick Herman Holtzmeyer, Robert Charnley grocer of Snow Hill, London, their executors and administrators the sum of 2100*l*. Consolidated 3 per cent. Bank Annuities upon trust."

The testator then proceeded to declare the trusts, as to one third to accumulate, till his daughter Ann Margaret Holtzmeyer should attain the age of twenty-one; then to permit her to receive the dividends for life for her separate use; and after her decease to divide the principal among her children surviving her, equally: if but one, to that one. He declared a similar trust as to the other two thirds for his other two daughters and their children. The will then proceeds thus:

"And in case any of my daughters shall depart this life without leaving issue of her body child or children her surviving then and in such case upon trust for and I do hereby give and bequeath such share or shares as aforesaid of my said daughter or daughters so dying as aforesaid in the said trust funds and the survivor or survivors of my said daughter or daughters so dying as aforesaid or children her or them surviving and also unto my son Henrick Herman Holtzmeyer if living and his issue him surviving equally share and share alike in the same manner as to the principal and interest, as the before-mentioned third of the said trust funds is limited and also in case any part of the said trust funds should come to my said son Henrick Herman Holtzmeyer by the decease of any of my said daughters according it is my will that if my said son should happen to depart this life without issue in the life-time of any other of my said daughters then upon trust as to such share of the said trust funds to be for the use and benefit of such of my said daughter or daughters equally if more than one as shall so survive my said son and her and their issue then surviving and in case my said

[*812] *three daughters and son shall all happen to die without issue child or children of his her or their body or bodies him her or them respectively surviving then from and after the decease of the survivor of them upon trust for and I do hereby give and bequeath all the said trust funds and all I am possessed of unto and amongst all child of my brothers deceased and living and sister her children in Germany all equally alike as shall be then living share and share alike also I give And bequeath unto my three daughters all my furniture in my dwelling house plate linen and all belonging to the dwelling house except one bed and furniture and the wardrobe which I give to my son Henrick Herman Holtzmeyer and the other furniture to be divided between my said daughters share and share alike and as near as may be my executors convenient or sold for them if they cannot agree about it and in consideration that the above three daughters to come equal share to my dear son Henrick Herman Holtzmeyer I give And bequeath to my son Henrick Herman Holtzmeyer the eighteen shares as I am possessed of in the Phoenix Fire Office that he may keep the same as a memorandum for my sake

while I was a member from the beginning of that Office And farther I give and bequeath unto my son Frederick Herman all the utensils belonging to the sugar-house not here mentioned and as a farther consideration for my son I give and bequeath the lease of the sugar-house and dwelling-house that my executors may have it in their power to work the house or part of it for the children till my son comes of age if it please God he shall live that time then let him do therewith what he pleases And in consideration after my decease when all debts and funeral expenses are paid and discharged I give and bequeath all the rest and residue both real and personal viz. bonds house bills and money I shall be possessed of at my decease I give and bequeath to all my four children equally share and share alike or if any of them shall die before me the surviving shall share equally alike and in consideration that any may understand my writing about my three daughters their funds in money of 2100*l*. upon trust if any of my daughters should die leaving no child or children her surviving the other two and my son shall go equally share principal and interest share and share alike but if there be no children after the deceased mother lawfully begotten her surviving same child or children shall receive their parent's share principal and interest what has arisen from her third part upon trust of the *2100*l*. And that my said trustees before-mentioned may [*813] act simply to my meaning if there should be a word wrong spelt or misplaced not to be controlled by any counsellor or attorneys whatsoever."

The testator then appointed his son and Charnley executors; and he gave each of them 100*l*. Then came the execution, attested by three witnesses; and afterwards the following codicil without any date:

"And in consideration that I have given to my son Henrick Herman Holtzmeyer the utensils of the sugar-house it is my will that he pays unto his three sisters the sum of 100*l*. each when it is convenient for him so to do And for the maintenance of my daughters should they remain single during my son's minority my executors shall provide for them what they think proper either out of the capital or interest as they think fit but should any of them marry during that period then the sum of 1000*l*. shall be paid to them as a marriage portion and they shall wait for the remainder till my son comes of age when it will be equally divided among them all As for the eighteen shares in the life and death annuities I give and bequeath them to my four children share and share alike and I give and bequeath unto my daughter Ann Margaret the sum of 100*l*. over and above what is mentioned in my will I give and bequeath unto my nephew John George Holtzmeyer the sum of 20*l*.;" and he gave 20*l*. to a servant, if living with him at his decease.

The testator died upon the 9th of March 1798; leaving only four children: three daughters and one son, Henrick Herman Holtzmeyer. At the date of the will he had only 2000*l*. 3 per cent. Consolidated Bank Annuities: but he purchased 100*l*. more in that

stock afterwards; and in a memorandum in his own hand he calls that stock the children's fund made up 2100*l*. The bill was filed by the daughters against the executors; and the usual accounts were directed. When the cause came on for farther directions, the property being very considerable, the Master of the Rolls ordered, that the nephews and nieces of the testator living in Germany should be made parties. In consequence of that direction most of them put in answers, claiming such interest in the testator's personal [* 814] estate as they are entitled to. John George *Holtzmeier and another nephew lived in London, and all the rest in Germany.

The question was between the four children of the testator claiming the general residue absolutely, and the nephews and nieces, claiming a contingent interest in the general residue in the event of the death of all the children without leaving issue.

Mr. Romilly and Mr. Johnson, for the Plaintiffs. The question depends upon the meaning of these words "and all I am possessed of." Either they are to be rejected as having no meaning, upon the whole will; or they must be understood to mean all he was possessed of in that fund of 2100*l*., not the general residue except what is afterwards specifically given; as will be contended. This is the will of a foreigner, very ignorant of the English language, and desiring to express himself in legal terms; from the frequent use of which it is probable, he had some old will before him. He must have meant to add those words, which, though not very useful, are very often found in legal instruments, "and all my right and interest therein." The other construction is totally inconsistent with every disposition in the will; and therefore though it must be admitted the words he has there used literally taken comprise the whole of his property, the Court will not give them that effect; but apply them to the preceding disposition; which is confined to the fund of 2100*l*. It is clear, what he comprehends under the description of all he is possessed of is not to be given to his nephews and nieces until the death of all his children without leaving issue; and yet there is no previous disposition of the bulk of his property. It must be contended, that by implication the bulk of his property is given to the children and their issue: but it would be very extraordinary to leave the bulk of his property to implication, expressing his intention as to a small part with so much anxiety. Besides, the notice he takes of the specific fund of 2100*l*. after the disposition of the general residue is quite inconsistent with the supposition, that the bulk of the property is given by implication. He also provides as to the residue for survivorship in the event of the death of any of his children in his life; clearly showing, that he did not intend the residue to go, as the 2100*l*. stock was given. Where two parts of a will [* 815] are quite inconsistent, the subsequent disposition *must take effect, and revoke the former.(1). If any doubt could

(1) *Sims v. Doughty*, ante, 243; see the note, 247.

be raised upon the will, the codicil shows clearly, that the children are to take the whole residue absolutely.

Mr. *Sutton* and Mr. *Stanley*, for the Defendants, the nephews and nieces. If these Defendants do not succeed in their claim to this contingent interest in the whole residue, as well as the fund of 2100*l.*, the Court must expunge words having a very clear and definite meaning. These words, which in themselves are very clear and distinct, have a meaning perfectly consistent with the rest of the will; when the whole is taken together. The Court frequently transposes clauses of a will: *Paramour v. Yardley* (1); and by a transposition of this clause, placing it after the residuary clause, the Defendant's construction may be supported without expunging any words. The words he uses in the residuary clause seem rather to apply to his trade than the general residue: by money meaning floating capital. That construction also will reconcile the supposed contradiction.

Mr. *Romilly*, in reply. If the Defendants' construction prevails, these children will not during their whole lives have the command of any part of this property; and the Court must suppose, the testator intended to confine their interest in favor of persons, whom he does not appear to have known. He specifies an intention, that the shares in the Phoenix Fire Office should not be parted with. What an extravagant construction; that he should desire his son may carry on the business, and yet give him no fund for that purpose; locking up all his property for these persons, or rather, for their representatives! This business requires a very large capital; and there is no way, in which the son can carry it on, as intended, unless he has part of the residue immediately. The words disposing of the residue are the most general that can be used; speaking at the time of his death; and equivalent to "all the residue of my personal estate." There is nothing to favor the narrow construction. The only effect of transposition would be, that the clause, on which they rely, would revoke ours, instead of ours revoking theirs. It is impossible to reconcile these two clauses.

* MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. [*816]
If this case had been new to me, I should have taken time to consider; especially upon a will so extremely inconsistent and inaccurate, being very anxious, when inconsistency appears in a will, to proceed upon firm and strong grounds, before I put a construction upon the words that does not naturally belong to them. But this cause has been before me very often; and it was by my order that these persons were made parties; that they might have their right argued; and, if not satisfied with my opinion, that they might take that of another Judge. As the cause first came before me, there were no other parties but those interested to put upon the will the construction, which after all the argument I have heard I feel myself obliged to adopt: but I thought it would be very improper

in a Judge in a case of such property behind the backs of other parties and without an argument on their behalf to decide against them.

I have considered this case very fully. The question is, what is to be the interpretation of the words "all I am possessed of," as standing in this will. I have no difficulty in saying, the legal construction of these words standing by themselves is, not exactly what they purport in language, all at the time of making the will, but if not explained, they must have the effect of passing all the interest in personal estate, which the testator might have at his death; and I admit, that, if those words closed the will, they would have passed all the trust fund and every thing the testator might have at his death. That is the legal construction: whatever may be the literal one. The question then is only, whether that legal construction is consistent or inconsistent with the other parts of the will. It is totally impossible to suppose, the testator could have intended these words in that sense. It would be perfectly inconsistent with every thing he has done in every other part of the will, and particularly with the codicil. He begins, and that is not immaterial in the construction of so strange and ridiculous a will, with these words, "and as for such worldly estate and effects which I shall be possessed of or entitled unto at the time of my decease." So, he had in view to dispose, not merely of the personal estate he had at that time, but of that, which he should have at his decease. He then goes on to separate a part of the estate, then specifically vested in [* 817] him; though it appears, * he had then but 2000*l.* 3 per cent. Annuities, and afterwards purchased 100*l.* more in that stock to make up the sum; which I must suppose he intended to be considered a specific part of his estate at that time. He gave it as 2100*l.* 3 per cent. Consolidated Annuities; which it was not: but it was made up that sum afterwards; and in a memorandum in his own hand he calls it the children's fund made up 2100*l.* He gives that specific fund to trustees; with an express direction to apply it to his three daughters in thirds; and it is very technically expressed. It is not a gift to them absolutely; but to receive the dividends for life, and after their respective deceases to divide the principal among their children. He then provides, that upon the death of any without leaving issue, that share shall go to the survivors; and in the event of the death of all without leaving issue makes this contingent disposition in favor of his nephews and nieces. If the will had stopped there, the children could have had nothing in the residue, which must have accumulated according to the strict construction.

I will now consider, how far the other dispositions are inconsistent with the construction, that otherwise would be put upon the words "all I am possessed of." He then gives to his children furniture; and it is not contended, that the furniture is not given absolutely. Then he gives his son the shares of the Phoenix Fire Office, the sugar-house, &c. and then gives to his children the residue in these

words: "all the rest and residue both real and personal viz. bonds house bills and money I shall be possessed of at my decease:" the words he had used before being "all I am possessed of." He gives it to his four children share and share alike; and does not go on to say, as before, that the interest only shall be paid them. He then directs survivorship among them, not if any of them shall die, but if any of them shall die before him. It is impossible to reconcile this with the construction of the Defendants. But that is not all. Even after this, which shows, the residue there meant was not included in the former words, he proceeds to recapitulate what he meant by the former words; and this is the will of a very ignorant and illiterate man, not knowing the English language, hardly knowing what he had said before, having disposed before of the residue in words, that admit of no doubt; and then coming to recapitulate his meaning as to this property. If it stood here, the latter part is quite inconsistent with the supposition, that * the words "all I [*818] am possessed of" in the beginning meant the residue of his personal estate. But then comes the codicil; which fortifies this construction. Is it possible to construe that as meaning, that it never should be divided among them all; but that they should continue to receive, either no part, according to the strict construction, or only the interest for their lives?

I adhere to the principles, upon which I determined the first case (1) this morning; that I must give some sense to every part of the will; if it is consistent with other parts; the legal and technical sense, if I can; and I am not to suppose, the testator has used words without meaning; if it is possible to give them a consistent meaning. The natural meaning of these words in this will is that attributed to them by the Plaintiffs: particularly considering, it is the will of a man ignorant of the English language. The construction I am bound to put is, that he meant all he possessed of those funds. Therefore declare, that the trust fund of 2100*l.* 3 per cent. Consolidated Bank Annuities is the only fund given to the testator's nephews and nieces upon the contingencies of the death of his children without leaving issue (2).

The costs must come out of the estate (a).

1. For a statement of some of the leading rules which govern the construction of testamentary instruments; see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194; see also the notes to *Sims v. Doughty*, 5 Ves. 243.

2. That the costs of a suit rendered necessary by the ambiguity of a testator's will, must come out of his general assets; see, *post*, note 2 to *Barrington v. Tristram*, 6 V. 345.

(1) *Ante*, *Upton v. Lord Ferrers*, 801; *Sims v. Doughty*, 243, and the note, 247; *Porter v. Tournay*, vol. iii. 311, and the note, 314.

(2) *Haynes v. Littlefear*, 1 Sim. & Stu. 496.

(a) Wherever a testator has expressed himself so ambiguously as to render it necessary to litigate his will in a Court of Equity, his general assets must bear the cost of it. *Jolliffe v. East*, 3 Bro. C. C. (Am. ed. 1844,) 27; *Baugh v. Reed*, ib. 192; *Sawyer v. Baldwin*, 20 Pick. 368, 369; 2 Madd. Ch. Pr. (4th Am. ed.) 558.

GUEST v. HOMFRAY.

[Rolls.—1801, MARCH 9.]

SPECIFIC performance refused on account of the laches of the Plaintiff, the vendor. (a)

A small incumbrance, which may be the subject of compensation, no objection to a specific performance, (b) [p. 818.]

Possession of a house by delivery of the keys, [p. 818.]

UPON the 31st of January, 1798, the Plaintiff entered into an agreement in writing to sell to the Defendant an unfinished house in Cardiff in fee for the sum of 800*l.*, payable by instalments. At the execution of the agreement the keys were delivered to the Defendant: and he looked over the house. On the 1st of February he went to Bath; where he stayed till April. Then finding that no abstract had been delivered, he called for an abstract; which was delivered upon the 18th of April. Objections were taken to the title upon that abstract: 1st; that no title appeared farther back than 1782: 2dly; it did not appear, what estates two persons of the name of Richards had: 3dly; a person, named Priest, stated to [*819] have conveyed in 1790, was at that time an infant: *4thly; several married women were stated to have conveyed in 1796; and there ought to have been fines. The Defendant took another house in Landaff; and refusing to perform his agreement with the Plaintiff, the bill was filed; praying a specific performance; and charging, that the Defendant's reason for refusing to perform the agreement was, that he had taken the other house.

The answer stated the Defendant's reason for declining to complete the agreement to be the Plaintiff's neglecting to make a title.

In support of the bill it was proved, that upon the 5th of April, 1798, the Defendant went to look over the house at Landaff; and upon the 2d of April he told the landlord, he should like to become his tenant, provided he could get rid of Guest's house; and on the 2d of June, he entered into the contract for that house, to take place from Midsummer following.

The solicitor for the Plaintiff by his depositions stated, that soon after the delivery of the abstract the Defendant and his solicitor called on the deponent. A conversation upon the objections ensued; and they were informed, the deponent was not then prepared to give a farther abstract on account of the absence of his partner; but it should be furnished. The abstract was taken away by the

(a) See the cases on this subject of laches in completing a purchase, collected in note (a), to *Marquis of Hertford v. Boore*, ante, 719; note (b) and (d), to *Omerod v. Hardman*, ante, 722; *Watson v. Reid*, 1 Russ. & My. 236; 1 Sugden, Vend. & Purch. (6th Am. ed.) 308, 309, [426], [427].

(b) See this principle stated in 2 Story, Eq. Jur. § 777; *Calverley v. Williams*, ante, 1 V. 210, note (a); *Calcraft v. Roebuck*, ib. 221, note (a); *Craven v. Tickell*, ib. 60, note (a); *King v. Bardeau*, 6 Johns. Ch. 38; *Hanbury v. Litchfield*, 2 My. & Keen, 629.

Defendant's solicitor a few days afterwards. Some written observations and queries were some time afterwards delivered to the deponent. The deponent applied for the abstract again, in order to complete it; but did not receive it till August. A fine was levied, as required, at the Autumn Great Sessions. A second abstract was left at the Defendant's lodging at Bath upon the 23d of April, 1799: but the Defendant said he would not take it as considering himself bound to have any thing to do with the purchase; and afterwards wrote a letter to that effect. The deponent understood from his conversation with the Defendant, when the first abstract was returned, that he would not fulfil the agreement, unless compelled.

The Defendant's solicitor by his depositions stated, that he and the Defendant went on the 2d of May, 1798, to the Plaintiff's solicitor; * who on receiving the objections in [* 820] writing said, his partner knew more, than he did, of Richards's title; and that no one could suspect it; and that the fines by the married women were unnecessary; as they were tenants in common. The Defendant said, he was desirous of completing the purchase on account of the advanced state of the summer, the building being unfinished; and being desirous of proceeding with the building he desired the Plaintiff's solicitor particularly to inform him, whether any better title could or would be made by the Plaintiff, and what answer could be given to the observations; and the Plaintiff's solicitor said, he could give no answer to the observations and queries; but he would take upon him then to say, that no better or other title could be made; upon which the Defendant then declared, that, as he could not get a good title, he should consider the agreement as at an end; and he would not lay out his money upon a bad title; and he and the deponent desired the Plaintiff's solicitor to take that notice; and that the Defendant considered the contract as at an end from that day; and the Plaintiff's solicitor said "very well." The deponent received a note the end of May or beginning of June; stating, that the Plaintiff being returned, and wishing to conclude the contract, the deponent was required to attend with the abstract; that the objections, if any, might be answered. Soon afterwards the deponent wrote an answer, that the abstract was gone to Landaff with other papers; that the Plaintiff's solicitor had had objections; but, if he had mislaid them, they might be had again, as soon as the Defendant returned; not meaning to revive the contract, but only to satisfy the Plaintiff's solicitor, that the objections were well founded. Upon the 18th of August the deponent was informed by the Defendant, that the Plaintiff's solicitor had applied to him for the abstract; (which had been sent with the Defendant's other papers to Landaff.) The deponent delivered the abstract that evening without any observations or queries thereon to the best of his recollection and belief; at the same time observing, that the abstract being taken with other papers upon the Defendant's removal to Landaff, and no answers having been given or notice taken since the 2d of May, and notice being then given by the Defendant,

that he considered the contract at an end, the deponent considered the abstract of no consequence ; and requested the Plaintiff's solicitor to take that notice, that receiving the abstract at that [* 821] *time must not be taken as intended to revive the agreement ; considering it at an end from the 2d of May, the time of giving the notice. No queries or observations were made upon that abstract at that or any other time to the best of the deponent's belief, &c., either by him or the Defendant except upon the 2d of May. The deponent never heard any thing more on the subject till the 10th of April, 1799 ; when another abstract was delivered at his office with answers to the observations ; which he returned the same day without any message.

The Defendant also relied on the circumstance of having given up a contract he had entered into with Mr. Kay for some leasehold premises, to be held with the house : but the Plaintiff proved by the evidence of Kay, that the Defendant might have them again, subject only to the remainder of a term for three years as to part ; of which a year and a half were expired : upon which the Master of the Rolls was of opinion, there was nothing in that objection.

Mr. Lloyd and Mr. Lewis, for the Plaintiff. The material date is the 2d of May 1798 : at which time the Defendant insists on being released from the agreement ; the objections to the title not being obviated at that time. That is a mere pretence. The fact is, he had taken another house ; and wished to get rid of this. If there is a good title at the time of the decree, it is sufficient : *Langford v. Pitt* (1). The evidence for the Defendant cannot be true : no professional man could have given such a reason as is there represented, that fines were not necessary.

Mr. Romilly and Mr. Whishaw, for the Defendant. Cases upon this subject can only prove the general principle now established ; that laches by the vendor will discharge the purchaser : *Pincke v. Curteis* (2) ; *Fordyce v. Ford* (3) ; *Lloyd v. Collett* (4) ; *Harrington v. Wheeler* (5) ; and the note (6), annexed to the report of that case, of the Lord Chancellor's judgment in *Lloyd v. Collet*. These cases have certainly produced some degree of alteration in the doctrine of this Court ; and have furnished something like a [* 822] general *principle ; that the time is a circumstance of importance : but it may be waived by the conduct of the party ; that it is incumbent upon the Plaintiff, calling for a specific performance, to show, that he has used due diligence ; or, if not, that his negligence has been acquiesced in ; and it is not necessary for the party resisting the performance to prove any particular injury

(1) 2 P. Wms. 629.

(2) 4 Bro. C. C. 329.

(3) 4 Bro. C. C. 494.

(4) 4 Bro. C. C. 469.

(5) *Ante*, vol. iv. 686 ; *The Marquis of Hertford v. Boore*, *ante*, 719 ; *Milward v. Lord Thanel*, there stated, 720, note ; *Omerod v. Hardman*, *ante*, 722, and other cases there referred to ; and in the note, iv. 691.

(6) *Ante*, 689, note.

or inconvenience : but it is sufficient, if he has not acquiesced in the negligence of the Plaintiff ; but considered it as releasing him. These principles, which are established by these cases, are founded in natural justice and public convenience.

Apply these principles to this case. In common cases the only inconvenience of the delay is as to the money ; but here the Court cannot put the parties in the same situation. Is it possible to say, this Plaintiff has not been guilty of the grossest laches ? It was incumbent upon him to tender the abstract. It is true, no particular time was limited for the completion of the purchase : but all the circumstances show, it was to be as soon as could reasonably be done. The objections were well founded ; and are not even now obviated. Suppose, the Defendant had reason for wishing to get rid of the contract : that cannot affect the case ; the Plaintiff must rely on his own activity and diligence ; and his conduct amounts to a complete abandonment, depriving him of all title to relief.

Mr. *Lloyd*, in reply. At least there ought to be farther inquiry : the objections being now entirely removed. I admit, the course of the Court is now greatly altered ; and the time now may be material. It is clear, this defendant only called for the abstract, in order to make objections ; having another house in view. Why was not the abstract returned immediately upon the conversation in May, instead of being kept till August ? Can it be true, that the Plaintiff's solicitor then admitted the contract to be at an end, when a fine was levied afterwards, to cure one of the objections ?

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. No one can doubt the motives of the parties in this cause. The only question is, whether the Plaintiff has done enough to show, he took all the pains he could to be ready to carry into execution the agreement ; which, it is perfectly clear, the Defendant meant to get rid of, if he could. The Plaintiff does not seem to me to have done all he ought to have done. It rests entirely upon that * point, without balancing the evidence of the two solicitors ; which it is not very easy to reconcile. By the contract immediate possession was to be given ; and was given without doubt ; though the Defendant says in his answer, he never took possession ; but the keys being in his possession, it must be considered, that he was in possession. Without doubt, by the delivery of the keys the possession was ready for him ; and indeed he had it. I do not like his answer in that respect. Having the keys in his possession, that is possession, if he chose to take it. Neither the Defendant demanded, nor the Plaintiff tendered, the abstract immediately. I do not agree, that it is solely incumbent on the vendor to move by making a tender of the abstract. Something is also incumbent upon the purchaser, to ask for it. But neither the one asked for, nor the other tendered it. Then what happened ? Before the 5th of April the Defendant had determined to get rid of the bargain, if he could ; and was looking out for another house. I do not know what his reasons were : but he had no right to make use of those reasons,

whatever they were, in order to make improper objections, or to expect any thing unreasonable from the vendor. Finding, he could make a bargain for a house at Landaff, he throws up the negotiation with Mr. Kay for the other premises, to be held with this house; and then without doubt he asked for the abstract with a view to make objections to the title. Objections were made; and I think, it is fairly put in issue by the answer, that the Defendant had stated, that the contract was at an end. I think, that called upon the Plaintiff's solicitor to state, that the conversation was not so. The Plaintiff's own attorney does not deny, that he saw, the Defendant meant to abandon the purchase, if he could. That should have made them more ready to cure the objections; and I should have expected the most decisive evidence from the Plaintiff's solicitor, that he never had an intention not to give another abstract; and he should have apprised the Defendant of that. There is no evidence, that, even when the abstract was sent back, he said, the Defendant was to be still bound, and was not released; and desired him to take notice of that. There is nothing to show, that he was proceeding with due diligence; and meant to proceed with the contract; nor that he was even holding the purchaser to it. It is clear, therefore, the Plaintiff was called upon to be more quick than he has been; and has not done all he ought. It happened, that he met with an un- [* 824] willing purchaser. I think, he has not *entitled himself to a specific performance: but I do not at all like the Defendant's answer; for he pretends, that he wished to go on with the purchase. It would have been better for him to have said, he did not wish to go on with it; and therefore wished to come to a determination upon it; that the objections were fair objections; and he thought himself entitled to take them. If he had done that, I should have dismissed the bill with costs. On the other hand, they should have cautioned him; and have told him, they were going on to make out the title; and that they were in hopes of doing it. If they had done all that, and shown a probable ground to him, that they might make a good title, I should perhaps not have thought a year too long.

Upon the whole the bill must be dismissed; but, under the circumstances, without costs (1). _____

As to the effect which *laches* may have upon questions of specific performance; see, *ante*, the note to the *Marquis of Hertford v. Boore*, 5 V. 719, and farther reference there given.

(1) *Ante*, *Calcraft v. Roebuck*, vol. i. 221, and the note, 226.

M'NAMARA v. ———.

[1801, MARCH 10.]

DEMURRER allowed to a bill to have a presentation to a living upon the next avoidance delivered up; charging the Defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family.

THE object of this bill was, that an instrument, called by the bill a reversionary presentation, and purporting according to the bill to be a *Presentation de presenti* to a living, to take effect upon the next avoidance, the church being now full, might be delivered up.

The bill charged the Defendant, a clergyman, with gross misconduct in the mode of obtaining this instrument and in other respects; while resident in the family as a private tutor.

A general demurrer was put in.

Mr. *Romilly*, in support of the demurrer: but the Lord CHANCELLOR [LOUGHBOROUGH] called on the Plaintiff's Counsel.

Mr. *Mansfield*, Mr. *Richards*, and Mr. *Pemberton*, for the bill. The ground of this bill is *quia timet*; to guard against the possible accident of such a man, as this Defendant appears to be, getting institution; which may be obtained, before it is possible to take the steps necessary to prevent the effect of this presentation; which will entitle him to institution, unless cause is shown. Suppose, the * Plaintiff should be dead at the time of the [* 825] avoidance; having left an infant child; who could not represent the case to the Bishop.

Lord CHANCELLOR [LOUGHBOROUGH]. No Bishop will institute upon such a presentation. Every purpose of this bill will be answered by sending it to the Bishop. If the case is, as represented by the bill, no bishop will institute this gentleman either to this or any other living.

The Demurrer was allowed.

THERE are, no doubt, cases in which a bill will hold for the delivery up of an instrument which might throw a cloud over the plaintiff's title, though it could be used with effect for no other purpose; see, *ante*, note 1 to *Colman v. Sarrell*, 1 V. 50; but misconduct in obtaining the presentation to an ecclesiastical benefice, if not amounting to positive fraud, seems to be a question properly within the jurisdiction of the diocesan; and it was on this ground, probably, that the demurrer in the present case was allowed. There are many acts which the law confides to a bishop, to execute them, not as judicial, but as domestic acts. *Heys v. Exeter College, Oxford*, 12 Ves. 345. When, however, a difficult point of law arises as to the validity of a presentation, it is, unquestionably, competent to the Court of Chancery to issue an injunction to stay institution. *Attorney General v. The Bishop of Litchfield*, 5 Ves. 830.

THE ATTORNEY GENERAL v. THE BISHOP OF LITCHFIELD.

[1801, MARCH 10.]

WHERE by neglect the number of trustees in a trust to present to a Living was not filled up at the time of an avoidance, the Court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground: but the Court will take care as to the future, that the trust shall be properly filled up.

The statute 7 Ann. c. 18, enacting, that the interest of the patron of an advowson shall not be displaced by usurpation, is not retrospective, [p. 828.]

Title by estoppel, [p. 831.]

By an order made in this cause on the 2d of July 1795 an injunction, which had issued to restrain the Defendants Edward Foley and his wife from proceeding at law until answer and farther order in an action of *Quare impedit*, was ordered to extend to stay trial; and an injunction was also directed, to restrain the Bishop from instituting Thomas Philip Foley to the vicarage of Womborne and Trysall in the county of Stafford; and an inquiry was directed, in whom the estate in the advowson was vested.

The Master's Report certified the following state of facts.

Sir John Wollaston by his will, dated the 15th of April 1658, devised to eight persons and their heirs the donation and parsonage of the rectory of Womborne and Chapel of Trysall; and desired their care to present a learned, painful preacher, honest in life and conversation, to the said Living, as often as it should be void; whereby souls may be gained to Christ; and he directed, that the three last survivors should make choice of new trustees to be added to them successively to present. The testator died in 1658. In 1662 John Dolman was instituted upon the presentation of the trustees.

By indentures, dated the 1st of February 1692, between John Hodgetts and Henry Stone, grandson and heir of Henry Stone, the surviving trustee, of the first part, the church-wardens, of the second part, and seven persons, as trustees, of the third part; reciting, [* 826] * that a *Quare impedit* was depending between Hodgetts and Stone, the latter claiming as heir of the surviving trustee; and the title of Sir John Wollaston being under some conveyance from the ancestor of Hodgetts; who claimed the advowson as his right and inheritance, and presented William Mould, the incumbent; and stating an agreement for the renewal of the trusts of the will, and that Mould should resign, and John Hilman, presented by Stone, should waive his right; it was witnessed, that Stone and Hodgetts conveyed to seven trustees and their heirs, to hold subject to the uses of the will, and to the intent to present John Newey; and it was agreed, that if Stone should farther prosecute his *Quare impedit*, the grant thereby should be void; and in case the church-wardens or some other person should not

by the advice of Counsel effectually endeavor to cause the trust to be renewed within ten years, then the trusts of the deed were to cease.

The Master stated, that he did not find, that the trust was ever revived within that time. The deed was executed only by Hodgetts and one of the church-wardens, and not by Stone.

Stone by his will, dated the 20th of February 1703, made a general devise, in trust to permit his sister Mary Stone and her heirs to take to her own use the rents, issues, and profits: but, if she should at any time be minded to dispose thereof, then the trustee Stone was to have the first refusal. Mary Stone married William Dare. By indentures, dated the 11th of August 1738, between Sussex Dare, son and heir of William Dare and Mary, his wife, deceased, sister and heir and sole executrix, devisee and residuary legatee, of Henry Stone, of the first part, and John Hodgetts, grandson and heir of John Hodgetts aforesaid, of the second part; reciting the indentures of February 1792, the presentation and institution of Newey, his resignation, and upon that the presentation by the trustees of William Fox; who died about thirteen years before the date of the indentures; upon whose death Rowland Pudsey, son and heir of Thomas Pudsey, the surviving trustee in the said indentures, with Samuel Short deceased and Ann, his wife, surviving daughter of Samuel Stone, the youngest son of Henry Stone the grandfather, presented Cornelius Jesson; and also reciting, that the church-wardens had not done any act to compel Hodgetts or Stone to convey, &c.; whereby their heirs were restored to their respective titles; Sussex Dare *for ending all suits, &c. and in [*827] consideration of 17l. 2s. paid by Hodgetts, granted, &c. to the use of Hodgetts, his heirs and assigns.

Upon the 24th of November 1756 Hodgetts presented Joseph Honeyborne; who died incumbent upon the 24th of April 1794. The Defendant Eliza Maria Foley is the daughter and heir of Hodgetts; and she and her husband Edward Foley upon the 7th of June 1794 presented Thomas Philip Foley: and by indentures, dated the 18th of June 1794, Mr. and Mrs. Foley conveyed to nine persons and their heirs upon the trusts of the will of Sir John Wolleston. The Master therefore is of opinion, that the legal estate was vested in Mr. Foley and his wife and the said trustees; unless the Court should be of opinion, that by virtue of the two usurpations, in 1695 by the trustees under the indentures of 1792, and by Rowland Pudsey, alleged to be the heir of the survivor of the trustees in that deed, with Samuel Short and Ann his wife, in said last-mentioned presentation described as daughter (1) and heir at law of Henry Stone the grandchild, in 1725, were a bar; and prevented Sussex Dare from conveying the legal estate to Hodgetts by the deed of August 1738.

(1) This description is not correct. By the deed of 1738, she is stated as the daughter of Samuel Stone, the youngest son of Henry Stone, the grandfather.

The information was at the relation of the churchwardens, and Samuel Peach, the heir at law of Pudsey, and the Reverend James Atcherley, presented by Peach, against the Bishop and Edward Foley and his wife, and the Reverend Thomas Philip Foley; and the prayer was, that the trusts of the will may be executed, and revived and renewed, according to the said agreement; that new trustees may be appointed; that Mr. Atcherley may be instituted: and that the Bishop may be restrained from instituting Mr. Foley.

The *Solicitor General* [Hon. S. Perceval] (1) and Mr. *Richards*, for the relators. Previously to the Statute of Queen Anne (2) a usurpation of a presentation did at common law defeat the possession of the owner of the advowson, and put him to his right. Henry Stone being out of possession, and put to a mere writ of right of advowson, that right could not be the subject of devise: therefore it descended to his heir at law, not now before the Court. The old

law upon this subject is stated by Lord Coke (3). The [*828] Statute was made to *correct the inconvenience. But this was before the Act. These Defendants claim the legal estate under the will of Stone; which claim cannot be supported. Even if Mr. and Mrs. Foley should happen to hold the legal estate by accident, your Lordship would not let them take advantage of that accident to carve out a family interest, and appoint trustees out of their own family, instead of applying to this Court, to have trustees appointed, to look generally to the trusts of the will. The Court will not now confirm this appointment of trustees by Mr. Foley, pending the litigation. These trustees are not appointed by the Court, nor according to the will.

— Mr. *Mansfield*, and Mr. *Scafe*, for the Defendants. It is impossible to entertain any doubt, that the legal estate is in Mrs. Foley; and as to the rest of the case there is no ground for this Court to interpose. This trust, as it is called, is not, as supposed, to present a person elected by the parishioners, or proposed by any other person; but is simply left to the discretion of these parties, subject only to that obligation, imposed upon every one, who holds a living, to present a proper person. As to the question of usurpation introduced by the Report, such a question has never been heard of in Westminster-Hall since the Statute. Previously to the Statute the usurpation displaced the right; and no possessory action could be brought: and to remedy that mischief the Statute was passed. I do not know, that the point, whether the Statute would apply to a previous usurpation, has ever been determined: but, if necessary, I should contend, that from the moment that Statute passed, both by the intent and words, no usurpation, whether previous or subsequent, should affect the patron's right: the object being to put an end to usurpation.

LORD CHANCELLOR [LOUGHBOROUGH]. It has been determined, I

(1) The Honorable Spencer Perceval.

(2) 7 Ann, c. 18.

(3) Co. Lit. 344.

think, that the Statute has no retrospect. That was determined in a *Quare impedit* between the Duke of Dorset and Sir Thomas Spencer Wilson at the assizes for the county of Sussex. The objection was taken by Mr. Knowler; and was a surprise upon every one: but it prevailed. I dare say, no writ of right of advowson has been brought since the Statute.

For the Defendants. But in this case there was no usurpation till after the Statute. Upon the dispute between the heir of the * surviving trustee and Hodgetts, the ancestor of [* 829] Mrs. Foley, each presenting, a settlement took place in 1692; under which a trust was created to present Newey. That deed, as it happens, was never executed by Stone, in whom the legal estate was. It was to be void, if the trust was not renewed in ten years. But that deed was acted upon. The trustees presented Newey. Can it possibly be said, that presentation of the person agreed upon to be presented by the trustees was an usurpation; which must be without the consent of the rightful patron? He was presented by the nomination of Stone, Hodgetts and all parties. He resigned long within the ten years: and the trustees, also within that period, presented Fox. These presentations must be taken to be with the consent of Stone; and therefore the deed, though not regularly executed by him, was clearly acted upon; and there was no usurpation. Then in 1738 the conveyance was made to Hodgetts, not by a title under the will of Stone, as suggested, but by Sussex Dare and his wife, by the heir at law of Stone. In 1756 Hodgetts presents: so that he was in possession. Having presented he could hold against all the world. Who could turn him out of possession? The legal estate therefore is now undoubtedly in Mrs. Foley; and then the question is, whether there is any reason for the Court to interpose at the instance of these relators, some inhabitants of the parish, and Peach, who has no possible right, representing himself as the heir of the surviving trustee under the deed of 1692; which was never executed; and if it had been, would have been void at the end of ten years; because the trust was not renewed.

The *Solicitor General*, [Hon. S. Perceval], in reply. First, the legal estate is not now in Mrs. Foley: 2dly, the case is now properly before the Court; who will take care to have proper trustees appointed. The object of the testator is one the Court will not be inclined to disappoint; that, instead of this discretionary power in the person, who should by accident be heir at law, there should always be a certain number of trustees; whose discretion should be exercised. With respect to the usurpation, the words of the Act are future. Though Stone was intended to be a party to the deed, it does not appear, that he was consulted. Whatever might have been his intention, even if it was ascertained, that he had given directions, he might have withdrawn his consent; and not having executed, they usurp upon his right as much as if he was never intended to be a party. The presentations of Newey

and Fox therefore were both usurpations upon his right; which he never had conveyed to the persons making those presentations. It is then supposed, that if this was a usurpation, it is done away by the joining of the heir at law. But if this was merely turned to a right, it was no more competent to transfer such right by deed than by will. The policy of the old law did not permit a transfer of rights of action in either way. Consequently this conveyance from the heir at law of Stone did not convey that right of action. That the conveyance was subsequent to the Statute is of no consequence: for if the Statute has no relation, there were no means of enabling the party, who had that right, to transfer it by deed. Then as to the presentation by Hodgetts in 1756, that possession again was gained by usurpation; and as he only gained the possession, a writ of right may be brought. The deed conveys nothing. The right remains just the same, as if Hodgetts had not made his usurpation. With respect to the relators, it is difficult to sustain the claim of Peach; but the church-wardens have an interest on behalf of the parishioners to have the trust as to this advowson properly executed, as intended. The Court also will take care of this public trust brought before them.

Lord CHANCELLOR [LOUGHBOROUGH]. The question now before the Court is only upon the injunction, which was granted to stay the institution: there being presented on the part of Mr. Foley one clerk, and on the part of the relators another. Upon the reference to the Master, I think, as at present advised, the doubt suggested by the Master is not well founded. 1st, As to the usurpations in 1792 and 1795: if I were of opinion with the Solicitor General's argument, which is very ingeniously put, I must let it go to be tried; for whether the acts were under title or by usurpation is matter to be pleaded at law; and the plea would be, that there was no usurpation; but the presentations were with the assent of the true patron. That is issuable; and the Jury in the *Quare impedit* might find so; and then there would be no usurpation. It is true, that the patron did not join in the deed. He might have been made a party without his knowledge: but, if he only assented to the arrangement, and there is great probability that he did, upon the face of the deed, his clerk, who was instituted, giving

[* 831] * up the living, the other, who was also presented, agreeing to withdraw, and a third person being appointed by agreement, if that was found by the Jury, there would be no usurpation. But if there was a usurpation, the effect of it is only to turn it to a mere right. A mere right cannot be the subject of conveyance, or pass by the will: but it descends; and the title is made under the heir at law of Stone, supposed at that time the true patron. Then what follows? The heir conveys in 1738. That, I agree, would be a conveyance of a mere right; supposing the usurpation antecedent to the Statute; and it would not avail as a conveyance; but then the person, to whom it is conveyed, enters; and makes a presentation afterwards. The consequence is, that the

conveyance from the heirs, though it does not operate as a conveyance, is an estoppel to the heir; and being an estoppel to the heir, all the world is estopped; and a complete title is gained. Therefore I conclude the legal estate is in Mrs. Foley.

Then, upon what ground am I to interfere now, to prevent the operation of the legal title, to prevent the Bishop from instituting upon the presentation under that title? It is said, with great foundation, this trust ought to be filled up: but if an avoidance happens, before the trust is filled up, the trustee executes the duty by presenting a proper person. If there is any objection to the clerk presented by him, if he presented for emolument to himself, the Court should interfere. But it would be very inconvenient, if I were to hold, that there can be no presentation, till the number is filled up, when by negligence it has happened, that the number is not filled up. If three trustees remained, I could not prevent their choice of new trustees to be added to them, to present. A lapse might incur. The filling up the trustees might take up a considerable time. But I agree, this is not a proper act of Mr. Foley, the trust being reduced to his wife. The Court ought to control the appointment of trustees: but that is not matter for decision now. It is no ground for continuing this injunction; and I must hold, that for this turn Mr. Foley has properly presented. When the cause comes on, it will be proper to refer it to the Master to appoint trustees.

Dissolve the injunction; and let the remainder of the cause stand over.

1. THE misconduct of the presentee to a living does not authorize a Court of Equity to interfere with what is peculiarly the province of the bishop; see the note to the last case.

2. There is a clear right in the Attorney General to have the number of the trustees who are to present to a living, which is at all in the nature of a charity, regularly filled up. *Attorney General v. Newcombe*, 14 Ves. 12; *Wilson v. Dennison*, Ambl. 87; *Davis v. Jenkins*, 3 V. & B. 159. But though the number may be incomplete or inefficient, the Court of Chancery will not allow a trust to be defeated by the negligence or the failure of the trustees who ought to execute it; see, *ante*, note 2 to *Bull v. Vardy*, 1 V. 270, and note 4 to *Moggridge v. Thackwell*, 1 V. 464.

ways of taking it, as between the two estates; either to consider all the bills as struck out of the case entirely, as issued for a bad purpose, like gambling transactions, &c. upon which there could be no proof; or to consider them all as good bills. I do not see, that there is a middle course.

March 20. The order was pronounced, that the petitioners should be at liberty to prove the cash balance only.

SEE notes 2 and 4 to *Ex parte Walker*, 4 V. 373.

CHAMBERS v. GOLDWIN.

[ROLLS.—1801, MARCH 21, AND SEVERAL DAYS PRECEDING.]

UNDER a conveyance of a West India estate, in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent. (a) Therefore the accounts, settled with the executors of the mortgagor since his death in 1791, were declared not to be considered settled: the prior accounts to stand; with liberty to surcharge and falsify; but not farther back than 1785.

A strong ground necessary to set aside settled accounts; or error, to surcharge and falsify, (b) [p. 837.]

TRISTRAM RATCLIFFE, seised in fee of a plantation, called Greenwich, and other premises in the island of Jamaica, by indentures, dated the 11th of August, 1781, reciting, that Theodore Foulks had

(a) A mortgagee may charge for the expenses of a bailiff or receiver, when it becomes necessary to employ one; but he is not entitled to make any charge, by way of commission, for his own trouble in managing the property and collecting and receiving the rents. 4 Kent, (5th ed.) 166; *Davis v. Dendy*, 4 Madd. 95; *Clark v. Robbins*, 6 Dana, 350.

This rule has been followed in New York, *Moore v. Cable*, 1 Johns. Ch. 385; and in Kentucky, *Breckenridge v. Brooks*, 2 A. K. Marsh. 339.

In Massachusetts a commission of five per cent. has been allowed to a mortgagee on the amount of rents and profits received by him as a compensation for his care and trouble in receiving the same and managing the estate. *Gibson v. Crehore*, 5 Pick. 146; *Tucker v. Buffum*, 16 Pick. 46.

But if the mortgagee actually occupies and manages the estate himself he is not to be allowed for his care and trouble. *Eaton v. Simonds*, 14 Pick. 98.

See Revised Statutes of Massachusetts, ch. 107, § 15, which, it is supposed by Mr. Chancellor Kent, puts an end to the allowance of any commission to the mortgagee. 4 Kent, (5th ed.) 166, note.

Disbursements and allowances made by a mortgagee in possession for condition broken, to which the mortgagor or his assignee assents, with a full knowledge or means of knowledge of all the circumstances, are to be deemed reasonable, and must be reimbursed. *Cazenove v. Culler*, 4 Metcalf, 246. See *Breckenridge v. Brooks*, 2 A. K. Marsh. 239.

(b) A person who comes to unravel accounts must always point out clear grounds for it. 1 Story, Eq. § 523, 527; Story, Eq. Pl. § 800-802; *Taylor v. Haytin*, 2 Bro. C. C. (Am. ed. 1844,) 310, 311; *Wilde v. Jenkins*, 4 Paige, 481. See also *Weed v. Small*, 7 Paige, 573; *Hobart v. Andrus*, 21 Pick. 526; *Calvit v. Markham*, 3 How. 343; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Bullock v. Boyd*,

advanced to and for Ratcliffe divers sums, to the amount of 9000*l.* currency, and had entered into various engagements for him for payment of debts; and that Ratcliffe had proposed to put Foulks into immediate possession of the said plantation and sugar-works; and that the same should continue in his absolute possession and under his sole management and direction, conveyed, &c. to Foulks, his heirs, executors, &c. in trust, that he should immediately enter, and be absolutely possessed, and continue to manage, cultivate, and improve, and work the same, and take the whole crops, rents, &c.; and consign and sell the same, as he should think proper, as factor, but on account and risk of Ratcliffe; and apply the money arising from such rents, issues, and produce, first, in payment of charges, commission to himself, as usually received by trustees, agents, and attorneys, acting for absentees, the commissions payable upon the sales, as usual among merchants and factors in London or the island, all money to grow due on account of the execution of the trusts, and the necessary supplies and contingencies, &c. for the estate; next, all sums of money Foulks should thereafter advance on account of Ratcliffe or for the cultivation, improvement, &c. of the estate; with interest at 6 per cent.; and to pay the overplus, if any, to Ratcliffe, his heirs or assigns.

* By indentures dated the 1st of May, 1785, reciting, [*835] that Foulks had not only applied the rents, &c. in execution of the trusts, but made several advances; and that the sum of 32,000*l.* currency was due to him on account settled, the same plantation and others were conveyed to Foulks; in trust to enter and be in actual possession six years; and (in the same manner as by the former deed) to manage, receive and consign, the whole produce; in trust to pay 450*l.* a-year to Ratcliffe, and after his death among his widow and children, during the remainder of the six years, and to apply the residue in satisfaction of all expenses, commissions for himself, &c. (as in the former deed); 3dly, all such sums as Foulks, his heirs, executors, &c. should advance for the cultivation, improvement, &c. and the sum of 32,000*l.* and the interest; and as to the surplus in trust for Ratcliffe; with a clause of redemption, and a power to sell in a year after the determination of the six years, if the

2 Edw. 293; *Philips v. Belden*, 1 Edw. 1; *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Hickson v. Aykward*, 3 Moll. 1.

A settled account can be opened only for fraud or specified errors, which are palpably and clearly proved.

The burthen of showing errors is on him who receives an account without objection. *Baker v. Bidle*, 1 Bald. 394; *Bainbridge v. Wilcox*, ib. 536; 540; *Chappadelaine v. Dechenaux*, 4 Cranch, 303; Fonbl. Eq. b. 2, ch. 7, § 6, note (n). See also *Locke v. Armstrong*, 2 Dev. & Bat. Eq. 147; *Wilde v. Jenkins*, 4 Paige, 481; *M'Can v. O'Ferrall*, 1 West. Parl. Rep. 593, 594; *Murray v. Tolland*, 3 Johns. Ch. 569; *Endo v. Calcham*, 1 Younge, 306; *Honore v. Colmesnil*, 1 J. J. Marsh. 517; *Davis v. Spurling*, Tambl. 199; *Bullock v. Boyd*, 2 Edw. 293; *Troup v. Haight*, 1 Hopk. 239; *Brownell v. Brownell*, 2 Bro. C. C. (Am. ed. 1844), 62, and notes.

See an explanation of the terms "surcharge" and "falsify" in 1 Story, Eq. Jur. § 525.

whole sum of 32,000*l.* should not be paid. It was farther agreed, that the accounts were to be settled annually.

By indentures, dated the 28th of May, 1787, reciting the former deeds, and that the sum of 32,000*l.* currency remained due, Foulks assigned to Goldwin. To that deed Ratcliffe was not a party.

By indentures, dated the 10th of February, 1790, reciting, that upon account settled in 1789 with Goldwin the sum of 31,299*l.* 2*s.* 11*d.* was due to him from Ratcliffe, the trust was prolonged to the 1st of May, 1797; till which time it was agreed there should be no sale; the allowance to Ratcliffe and his family was increased to 750*l.* a year; and it was agreed, that in future the supplies for the estate should be sent, and the future crops shipped for Great Britain by Goldwin.

In 1791 Ratcliffe died; having devised his plantations, &c. to his sons, charged with portions for his daughters. Goldwin was appointed one of his executors, trustees, and guardians of his children, but he renounced; and settled the accounts of the West India estates with the other executors.

The bill was filed in 1796 by the daughter of the testator and her husband against Goldwin and the other executors and the [*836] two sons * of the testator; praying, that an account may be taken of the personal estate and of what was due to Goldwin; and that he may not be permitted to insist upon any of the accounts settled with the testator or with the other executors; and the necessary accounts as to the real estate, and other accounts arising out of his management.

The Defendant Goldwin resisted opening the accounts; contending, that this was a trust not a mortgage; and insisting upon all the benefits arising from the management of the West India estates as trustee or agent. The cause was argued very fully upon the circumstances and evidence by Mr. *Romilly* and Mr. *Martin*, for the Plaintiffs, and by Mr. *Piggott*, Mr. *Richards* and Mr. *Hart*, for the Defendants.

March 21st. The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN] stated the case and delivered his opinion.

This case has created in my mind a considerable degree of doubt as to the decree to be made; so as to do justice to both parties; which from the situation, in which the accounts must necessarily stand, may be perhaps extremely difficult. The great question is, in what form, and under what restrictions, the Defendant is to account; for, that he is accountable there can be no doubt. I shall begin only in the year 1781. At that time Ratcliffe was extremely involved in his circumstances; and he conveyed his estate to Foulks, by a very extraordinary deed, and such as it is impossible this Court can countenance, any farther than is absolutely necessary in order to do justice to the person, to whom the estate was conveyed for the purpose of paying the debts. Another deed was executed in 1785; which discovers a very unfortunate circumstance; for, though by

the former deed part of the estate had been conveyed for the purpose of paying off the sum of 9000*l.* and every thing else, instead of these debts being paid, in the space of four years the debts were increased to the amount of 32,000*l.* currency. It is said, this is not a mortgage, but a trust. I say it is a mortgage; and this is a way of paying a mortgage, that this Court will look at with very jealous eyes. In 1787 the present Defendant, without the assent certainly of Ratcliffe, purchases Foulks's interest in the estate under these deeds: but in * 1790 Ratcliffe confirms [* 837] that deed by another conveyance in almost the same words and with the same powers. The only difference is increasing the annual sum payable to himself from 450*l.* to 750*l.* a year. In 1791 he died.

The only question is, in what manner these accounts shall be taken. The Defendant insists, he regularly settled accounts with Ratcliffe in his life-time, and that they are not now to be impeached: but he admits, he has availed himself of all the powers in the deed, and made all those charges, that it was competent to him to make: namely, 6 per cent. commission upon all the money advanced by him, and also commission upon the receipts and payments; as a mere trustee, agent, or attorney, having no other interest than that, would have charged. On the other hand it is said, this deed was taking advantage of the circumstance of having a distressed man for his debtor; taking possession of his estate; and, though not calling it a mortgage, taking possession as a mortgagee in fact, though under the name of trustee; and that he is entitled to such charges only as a mortgagee could make.

The Act of Assembly, though, I think, I could make the decree without it, very wisely goes on, after settling the terms to be allowed for an agent, to enact, that no mortgagee in possession shall be entitled to any commission for his management or transactions, except what shall be paid by him to the factor for such commission. They knew, and every one, who attends the Cockpit, must see, the great advantage, that results from the possession taken under a mortgage of a West India estate, having all the consignments, &c. Therefore they made that provision. It is said for the Plaintiffs, that notwithstanding the stipulations of the deed it is contrary to equity and good conscience, that the Defendant should be permitted to avail himself of all the powers given by it. First, as to these being settled accounts, if I am of opinion, that under the circumstances he ought not to be entitled to charge commission, the facts proved are fully sufficient to entitle them to surcharge and falsify; for unquestionably the accounts settled allow that commission. It is totally unnecessary to enter into that; admitting, that, where there are settled accounts, you must show something strong, to impeach the account, or error, so as to set it aside in one case, or to surcharge * and falsify in the other. I do not mean to [* 838] take this up before 1785; though perhaps doubts may be entertained, whether the sum of 32,000*l.* currency was due at that

time. Yet I am not called upon or justified in going beyond that, or to unravel the accounts before that period. It would be going back a great many years; and would certainly lay the Defendant under great difficulties; if I were to unravel that, which Ratcliffe did acknowledge under his hand to be the state of the account with Foulks: but it is perfectly clear, that the Defendant Goldwin must consent to have the account surcharged and falsified, not only during his own time, but also during that of Foulks. But I do not mean to go beyond that.

With regard to the settlement after the death of Ratcliffe, the Defendant Goldwin did a very incautious thing, without calling in those interested in the estate renouncing the probate of the will himself, for the mere purpose, as it seems to me, of settling with the other executors. I consider this deed as an oppressive, improper deed, that ought not to have been made; containing powers, that ought not to be given, and that no creditor ought to have imposed; and in that light I cannot think, accounts settled with this poor man upon the footing of this deed can be considered not liable to be surcharged and falsified. The Act of Assembly would be waste paper if this could succeed merely by his calling himself not a mortgagee, but an attorney, to entitle himself to all these charges for commission. It was unconscientious. The Defendant was living in England a great part of the time, for which he charges commission. Clearly he is not to be entitled to charge any commission whatsoever, except so much as he paid to others. But distressed men have not a right to call upon this Court to go back into accounts of several years, and thereby lay persons under insuperable difficulties. Purchasing from Foulks without the intervention of Ratcliffe the Defendant ought to be obliged to account for Foulks's time. I am rather inclined to think, he stands in the shoes of Foulks: but then he must account, as Foulks would have done. No account is now prayed against Foulks; and it is some disadvantage to the Defendant, that Foulks is not before the Court. I let him start with the deed of 1785; but giving him credit for 32,000*l.*, as being due, he has no reason to complain.

[* 839] The decree declared, that the accounts settled with Ratcliffe are not to be unravelled: but that the Plaintiffs should have liberty to surcharge and falsify from the date of the deed 1785; and that the accounts settled with the executors are not to be considered settled; and that Foulks and Goldwin are not entitled to commission or agency, except so far as they have paid any money in respect thereof (1).

[This case was heard again on appeal, 9 Ves. 254; and as to a distinct point, 11 Ves. 1.]

1. That upon an application for leave to surcharge and falsify settled accounts, specific errors must, as a general rule, be expressly pointed out; see, *ante*, note 1

(1) See this decree varied on appeal, *post*, vol. ix. 254. *Lord Trimleston v. Hamill*, 1 Ball & Beat. 377; and, as to the limitation of accounts, the note, *ante*, 439, and notes.

to *Matthees v. Wallwyn*, 4 V. 118; and that a recital in the assignment of a mortgage will not bind the mortgagor, unless he was a party to the mortgage, or (as in the principal case) subsequently approved the representation made by the assignor; see note 2 to the case before referred to.

2. In conformity with the doctrine of the principal case, — that a mortgagee must not stipulate for any collateral advantage; it has been determined, that a condition for possession of lands, to be accounted for at an undervalue, in discharge of a loan, is usurious and invalid: *Morony v. O'Dea*, 1 Ball & Beat. 113: see also *Drew v. Power*, 1 Sch. & Lef. 194, and *Gubbins v. Creed*, 2 Sch. & Lef. 218, that a lease granted in consideration of a loan to the lessor cannot stand. And an original stipulation, at the time when money is lent on mortgage, that all arrears of interest which may afterwards accrue, shall be turned into principal, is void: see, *ante*, note 2 to *Morgan v. Mather*, 2 V. 15: neither can a mortgagee claim to be paid as a receiver; nor if he enter into possession can he universally and under all circumstances, appoint a receiver with a salary. *Davis v. Dendy*, 3 Mad. 173; *Langstaffe v. Fenwick*, 10 Ves. 405. The nature of West Indian property, however, may entitle this last principle to a distinct consideration; see the note to *Morris v. Elme*, 1 V. 139.

3. With respect to the general rules, as to allowing interest on a legacy, by way of maintenance for an infant legatee, to which the testator stood in the relation of a parent, or *in loco parentis*; see note 2 to *Crickett v. Dolby*, 3 V. 10; and the notes to *Greenwell v. Greenwell*, 5 V. 194.

POWELL v. EVANS.

[ROLLS.—1800, AUGUST 7; 1801, MARCH 24.]

EXECUTORS under the circumstances charged with a loss by neglecting to call in money, lent by the testator upon bond. (a)
Executors ought not without great reason to permit money to remain upon personal security longer than is absolutely necessary, [p. 844.]

THE testator, after giving some legacies, bequeathed the residue of his estate to the Plaintiff Mrs. Powell, then an infant, in case she should attain the age of twenty-one; with a limitation over upon her death under that age; and appointed the Defendant Evans and James his executors. The testator died in 1792. At the time of his death part of his personal estate was out upon personal security; and one sum of 300*l.* upon the bond of Charles Price as principal, and — Roberts, as surety. The executors did not call in the

(a) 2 Williams, Executors, (2d Am. ed.) 1884, *et seq.*, 1290, 1291; *Moyle v. Moyle*, 2 Russ. & My. 710; *Burton v. Buxton*, 1 Mylne & Cr. 88; Ram on Assets, ch. 38, § 1, p. 495, 496; 2 Story, Eq. Jur. § 1274; *Tebbs v. Carpenter*, 1 Madd. 290; *Brazer v. Clark*, 5 Pick. 96.

This subject of the duty of executors to call in debts due the testator was very much discussed in *Schultz v. Pulver*, 11 Wendell, 361. See also *Louson v. Copeland*, 2 Bro. C. C. (Am. ed. 1844,) 156, 157, and notes; *Robinson v. Harris*, 1 Hayes & J. 412; *Witherspoon v. M'Calla*, 3 Desaus. 245; 2 Stephens, N. P. 1866, 1867.

And the case is stronger, if the executor is himself the author of the improper investment; as upon personal security, or an unauthorized fund. 2 Stephens, N. P. 1867; *Smith v. Smith*, 281, 441; 2 Story, Eq. Jur. § 1274. See *Hall v. Cushing*, 9 Pick. 395; *Louson v. Copeland*, 2 Bro. C. C. (Am. ed. 1844,) 156, note (3); *Routh v. Howell*, *ante*, 3 V. 565, note (a).

money ; but permitted the securities to remain, as they found them. There was no necessity for calling them in : the legacies, except to a trifling amount, being contingent. The interest upon the bond for 300*l.* was regularly paid by Price to the 5th of August, 1795. In April 1796 he became bankrupt. Until that event no application was made by the Plaintiffs, who were married in 1794, to the executors to call in the money out upon security ; but afterwards upon an application they proceeded to get in the remainder. Nothing was ever received upon the bond of Price : no dividend being made under the bankruptcy ; and the surety having absconded. Notwithstanding this, Evans signed the bankrupt's certificate.

Mrs. Powell having attained twenty-one, the bill was filed for an account ; and under these circumstances the Master had charged the executors with the principal sum of 300*l.* and a year's interest due upon the bond. The Defendant James took an exception to the report.

It appeared by the examination of Price, that he had been failing for some time before his bankruptcy ; that during that [* 840] * time he paid several debts ; for which he was called upon ; and he represented, that this debt, if called for, might have been paid. He also stated, that at the execution of the bond the surety was considered a responsible person.

The answer, which was not replied to, stated, that the Defendants in conversation with the testator making some objection to undertake the office of executors, he told them, they would have nothing to do but to receive the interest of his money out upon securities. The Defendant Evans consulted Mr. Powell as to signing the bankrupt's certificate ; who told him, he might do what he thought proper about it. Evans then wrote to his son, who was in the profession of the law ; and upon his advice signed it without any communication with his co-executor.

Mr. Romilly and Mr. Hall, in support of the Exception. The question is, whether this loss has arisen from wilful default. The Plaintiffs not being entitled to the residue, until Mrs. Powell attained the age of twenty-one, there was no purpose, for which this money was to be called in immediately. If it had been called in, it must have been laid out on other securities : but the testator must have intended the money to remain on this security ; which was particularly selected by him, not merely a bond taken for an antecedent debt. There is not a circumstance, showing, that the executors had the least reason to believe, the obligors were not perfectly solvent. If the executors are liable in this instance, it must be held, that executors are bound not to suffer money placed out upon personal security to remain ; though there should be nothing to induce them to call it in. The question is of very general importance. In this instance the effect of a decision against these executors will be a very great hardship. The will contains no particular direction. No case has gone this length ; and Judges in general have expressed an opinion, that the cases had gone far enough, where there was no fraud,

and an honest intention. All questions of this kind must depend upon the particular circumstances, the nature of the trust and the conduct of the executor. What trust has been imposed and broken? Are executors in every case to get in the debts at the peril of being answerable themselves: the will containing no direction to call in the property, to change the securities, &c.? It has been frequently said, that *changing securities is a *devastavit*. [*841] The will giving them no such power confirms the account of the conversation with the testator. In *Rowth v. Howell* (1) the language of the Court is strong in favor of the executor; and a variety of cases go to this; that, unless there is particular misconduct, there must be actual receipt, in order to charge him. *Lowson v. Copeland* (2), which will probably be cited, turned upon the particular circumstances; which distinguish it from this case. There was a hand to receive the property, if the executor had done his duty. Instead of contesting the right to the residue with the Plaintiffs, he ought to have paid it over; and he might have had a discharge; which these executors could not. The act of signing the certificate may be a matter of justice.

Mr. *Lloyd* and Mr. *Hubbersty*, for the Plaintiffs.—Under this bankruptcy there was no dividend. Is it proper for trustees for an infant to sign the certificate under such circumstances? What passed between the testator and the executors as to the manner, in which they were to do their duty, is not evidence. Certainly cases of extreme hardship have occurred: but that has often been stated on both sides; and the consideration is, whether it is not better, that executors should be kept strictly to their duty; and that the rules should not be relaxed, so as to put infants in their power. What is meant by saying, there was no obligation to call in this money? Suppose, it had been upon a note of hand. Powers in a will for this purpose are useless. It is incident to the office of executor to call in and put out the money, as may be most beneficial for the estate. It has been determined, that, if an executor puts money in the Funds, and declares a trust upon it, that will bind the infant, whether the Funds rise or fall. That was determined by Lord Northington; and is certainly a very convenient rule. Is there any rule, that executors may suffer money to continue out upon personal security? This Court never permits it. The common practice of the Court is to order personal securities to be called in. It is the same, whether the executor continues the money, or puts it out himself, upon personal security. There *is every [*842] reason to think, upon the bankrupt's examination, that if he had been sued or threatened, he would have paid this debt, as he did others. *Lowson v. Copeland* was a much stronger case against

(1) *Ante*, vol. iii. 565. See also *Balchen v. Scott*, ii. 678, and the note, 679; *Hovey v. Blakeman*, iii. 596; Mr. Fonblanque's note, 2 Treat. Eq. 181, 182, 2d edit.; and Mr. Sanders's note to *Leigh v. Barry*, 3 Atk. 584; *Tebbs v. Carpenter*, 1 Madd. 290.

(2) 2 Bro. C. C. 156.

an executor. He had applied by an attorney : but he was charged, because he did not take legal steps. That case is decisive, that this Court does not permit an executor to suffer any part of the personal estate to remain upon a bond ; and even an application, if not successful, will not discharge him. If it is laid down, that, unless the purpose of the will calls for it, they may let it remain, that will justify them in letting it remain any time. What an inlet of fraud and connivance with debtors ! What will become of infants ? For that reason the general rule has been established ; that all executors and trustees after a reasonable time cannot continue the property upon personal security, except at their own peril ; and there can be no excuse. It is very material to connect these Defendants ; as Evans is insolvent.

Mr. *Romilly*, in reply.—If the rule is taken, as now stated, the question is, whether there shall be executors. It is admitted, that it has been but lately decided, that an executor is safe in laying out money in the Funds. It is not surprising, that these Defendants did not know that. The Funds were falling at this very time. Is it universally known, that executors are to call in money lent upon a bond, (for that is this case, not a bond given to secure a debt, but, the testator thinking it an eligible security,) and to lay it out in the Funds ? The payment of all these sums by Price, when demanded, was sufficient to induce them to think him safe. The examination upon which they attempt to charge this executor, states, that the interest was received regularly ; and he lived at a distance ; and had no person to consult. They thought, they did right in leaving the money with the persons the testator chose ; and whom they and he thought perfectly secure. The distinction is always recognized between an executor doing nothing, but leaving it, as he found it, and being active ; as, if he takes an additional security : which prevents a suit till a future time. *Lowson v. Copeland* certainly was decided upon the particular circumstances. The application there shows, the executor had reason to doubt the solvency of the debtor. If the fact is, that Evans is insolvent, this is the hardest case possible ; for it is proved, that the interest upon this bond was uniformly [* 843] paid to Evans alone ; and James, * the other executor, never did act. Nothing has been lost by signing the certificate ; the bankrupt being only a clerk in the stamp-office ; and having no property ; and though there should not be any dividend, it does not follow, that the bankrupt ought not to have his certificate, if he has acted fairly, and that circumstance proceeds from misfortune. Till a late case in the Court of King's Bench it was doubtful, whether an uncertificated bankrupt could bring an action for his earnings : but certainly there is no decision going to this extent.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. I shall be under the necessity of looking into this case and *Lowson v. Copeland*. Certainly there is a great distinction between executors

putting out the money themselves and permitting it to remain upon the security the testator has chosen.

March 24th. The MASTER OF THE ROLLS. The single question upon this exception is, whether the executors have by their conduct and neglect made themselves liable to make good to the estate this sum of money, as being lost through their default. It is a question of great importance; to which the Court is bound to attend with great rigor on the one hand, to protect persons not capable of supporting their own interests, which was the case of this Plaintiff, having been an infant at the time, and also with great tenderness to executors; who are called upon to execute often onerous and difficult trusts; and are entitled to great indulgence; unless neglect is fully proved. No man, who ever sat in this Court, has been more averse than I am to charge executors, who intended fairly to discharge their duty, and more cautious not to hold them liable upon slight grounds; thereby deterring others from taking upon them such an office. With a due attention to these circumstances I have considered this case; and with all the allowance I am desirous of making to the present Defendants as executors, I think, I should not do justice to the Plaintiffs or the public, if I did not hold them guilty in this instance of very gross neglect: which upon the principles, on which these cases have been determined, must make them liable to repay to the Plaintiffs the loss incurred.

* It appears from the account of the executors, that at [* 844] the death of the testator this sum of 300*l.* was due only upon the bond of Price and of Roberts: who is gone no one knows where. At the time he entered into this security, Price in his examination says, he was a responsible freeholder's son. Down to the year 1795 not a single application was made, either to inquire into the situation and circumstances of Price, or to call upon him to pay in the money; which certainly was their duty. I desire to be understood, that debts due upon personal security are what executors without great reason ought not to permit to remain longer than is absolutely necessary. However I make allowance for ignorant people. Their defence is, that as the testator lent the money upon that security himself, they might well repose upon it. Therefore they admit, they made no attempt to have it paid in, or even inquired into the circumstances of the debtor; but permitted it to remain. He paid his interest regularly; and that satisfied them. But upon his own examination it appears, that all this time he was a falling man. He paid several debts, for which he was called upon; and he represents, that he would have paid this, if he had been called upon. It ended in total insolvency, and at length in bankruptcy.

If the case stood here, only upon leaving the bond without inquiring into the circumstances of either the principal or surety, I should have thought upon the authority of *Lowson v. Copeland* and other cases of that sort, the executors would have been liable; for where

infants are concerned, they are not to permit money to remain upon personal security. But a circumstance occurred in this case after the bankruptcy. One of these persons signed the certificate. A more rash thing never was heard of. What right had he without consulting the *Cestuy que trust* to absolve the bankrupt from any farther demand? That stamps a color upon this case, that would not otherwise belong to it. The reasons he gives are perfectly ridiculous. He says, the certificate was brought to him; and he asked the husband of the Plaintiff, whether he should sign it; who desired him to do as he pleased; and then he wrote to his son, who was in the law; who told him, he had better sign it; and so he did. But I do not put it upon that. I am bound to hold, that these executors were guilty of neglect; which neglect, it appears, [*845] has lost this money; for *Price says in his examination, he would have paid it if called upon.

Over-rule the exception; and the Plaintiffs must have the deposit.

THERE may be cases in which it would be injurious to the parties beneficially interested, if trustees were to press on all the remedies for recovery of a demand; *Sitwell v. Bernard*, 6 Ves. 535; but as a general rule, executors are under the necessity of getting in their testator's property, by all possible remedies; if any securities seem proper to be continued, the Court alone, it has been said, must judge of that, and give the proper directions; executors who take upon themselves to exercise a discretion on such points, must, as in the principal case, be responsible for any loss sustained in consequence of their misplaced confidence; however good their intention may have been: *Gaskell v. Harnam*, 11 Ves. 498: for though it is never the inclination of Courts of Equity to discourage persons from acting as executors, or to throw difficulties in their way; (*Freeman v. Fairlie*, 3 Meriv. 42; *Tebbs v. Carpenter*, 1 Mad. 298;) still, persons accepting a trust of that kind must use reasonable diligence; if, by their default, any loss arise, they must make it good to their testator's estate. *Lowson v. Copeland*, 2 Brown, 157; *Tebbs v. Carpenter*, *ubi supra*; see also note 4 to *Tew v. Winterton*, 1 V. 451. An executor, however, (like any other trustee or agent,) will be exempted from responsibility when he has transacted business in the regular and usual manner; though the losses sustained might, by a more than ordinary degree of caution, have been avoided; see the concluding part of the note to *Routh v. Howell*, 3 Ves. 565: and that the rule above stated, which requires a trustee or executor to call in all outstanding debts or securities, at least admits qualifications and restrictions of its generality; see note 1 to *Sitwell v. Bernard*, 6 V. 520.

MOTH v. ATWOOD.

[ROLLS.—1801, MARCH 24.]

BILL to set aside the sale of a reversion dismissed with costs: the only ground on the evidence being inadequacy of price; (a) and no fraud, &c.; and the bill filed twelve years after the sale, (b) [p. 845.]

THIS bill was filed to set aside the sale of a reversion by the Plaintiff to the Defendant. The only ground established by the evidence was the inadequacy of the consideration; but there was no fraud or circumvention; and the Plaintiff had previously offered it to several people. The bill was filed twelve years after the sale; the Plaintiff having been abroad in the interval.

The cause stood some time for judgment.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This is one of those unfortunate cases, upon which the Court, feeling, that the transaction is not quite of the complexion to be wished, yet under all the circumstances is not at liberty to grant the relief prayed. The Plaintiff was very indigent, and of very dissipated manners. The evidence as to the value of the estate is very con-

(a) Inadequacy of consideration is not alone sufficient to vitiate a contract, see *January v. Martin*, 1 Bibb, 586; *White v. Flora*, 2 Tenn. 430; *Stewart v. State*, 2 Harr. & Gill, 114; *Beard v. Campbell*, 1 A. K. Marsh. 127; *Seymour v. Delancey*, 3 Cowen, 445; *Garnett v. Mason*, 6 Call, 308; S. C. 2 Brock. 185; *Udall v. Kenney*, 3 Cowen, 590; *Bunch v. Hurst*, 3 Desaus. 292; *Butler v. Haskell*, 4 Desaus. 651; *Osgood v. Franklin*, 2 Johns. Ch. 1; S. C. 14 Johns. 527; *Whitefield v. M'Leod*, 2 Bay, 380; *Knobb v. Lindsey*, 5 Ham. 47; *Hubbard v. Coolidge*, 1 Metcalf, 93; *Gregory v. Duncan*, 2 Desaus. 637.

The inadequacy of price must be so great as to afford a strong presumption of fraud. *Butler v. Haskell*, *Udall v. Kenney*, *ubi supra*; or be coupled with an inequality in the condition of the parties, *George v. Richardson*, Gilmer, 230; or must be attended by circumstances evincing unconscientious advantage, taken by the vendee of the improvidence and distress of the vendor. *M'Kinney v. Pinkard*, 2 Leigh, 149. See for other cases where inadequacy of price has been considered. *Western v. Russell*, 3 Ves. & Bea. 187; *M'Ghee v. Morgan*, 2 Scho. & Lef. 395, note; 1 Sugden, Vend. & Purch. (6th Am. ed.) p. 315, [437], *et seq.*; *Catheart v. Robinson*, 5 Peters, 264; *Sarter v. Gordon*, 2 Hill, Ch. 126; *Moffat v. Winslow*, 7 Paige, 124.

But where the inadequacy of price is such, that the mind revolts at it, the Court will lay hold of slight circumstances of oppression or advantage to rescind the contract. *Hough v. Hunt*, 2 Ham. 502. See *Gist v. Frazier*, 2 Litt. 118; *Osgood v. Franklin*, 2 Johns. Ch. 23; *Holden v. Crausford*, 1 Aik. 390; *Hardeman v. Burge*, 10 Yerger, 202; *Tripp v. Tripp*, 1 Rice, Eq. 84; *Williams v. Powell*, 1 Ired. Eq. 466; *Heathcote v. Paignon*, 2 Bro. C. C. (Am. ed. 1844,) 167, 179; *Stephens v. Bateman*, 1 ib. 22, 26.

For cases respecting the sales of Reversions, see *Gwynne v. Heaton*, 1 Bro. C. C. (Am. ed. 1844,) 10, note (c), and cases cited; *Osgood v. Franklin*, 2 Johns. Ch. 26.

(b) In reference to the general disinclination of Courts of Equity to aid stale demands, see *Jones v. Tuberville*, 4 Bro. C. C. 115; S. C., *ante*, 2 V. 11; *Deloraine v. Brown*, 3 Bro. C. C. 633, 645, 646; *Benzein v. Lenoir*, 1 Car. Law Repos. 508; *Breckenridge v. Churchill*, 3 J. J. Marsh. 15; *Frame v. Kenny*, 2 A. K. Marsh. 146; *Coleman v. Lyne*, 4 Rand, 454; *Shaver v. Radley*, 4 Johns. Ch. 316; *Coze v. Smith*, 4 Johns. Ch. 271; *Philips v. Belden*, 2 Edw. 1; *Prescott v. Hubbell*, 1 Hill, Ch. 213; *Hercy v. Dimwoody*, 4 Bro. C. C. 258.

tradictory, as it always is. He was determined to sell this reversion; and if the law will not prevent a man from selling, it would be too much for a Court of Equity to say, any bargain upon the subject will be bad. At first he was inclined to sell it for a weekly allowance. He had no subsistence. It is clearly admitted, it was offered over and over to all the town, to twenty persons. That circumstance is decisive; and would alone be sufficient to dismiss a bill brought at the distance of twelve years from the transaction. This man was not going about, or lying by, to avail himself of an opportunity to get a good bargain. The Plaintiff offered it to the husband of the tenant for life; who refused it; and now the Plaintiff comes at this time, saying, the tenant for life was in a dying state. The bill must be dismissed with costs. I admit, it is a very considerable bargain: but there was no fraud or circumvention. It was done deliberately; and not in consequence of a plan laid to gain a good bargain.

The bill was dismissed with costs (1).

SEE notes 2, 5, and 6 to *Crowe v. Ballard*, 1 V. 215.

[* 846]

EMERY v. WASE.

[ROLLS.—1801, MARCH 24.]

THOUGH a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the Court refused a specific performance; and dismissed the bill; leaving the Plaintiff to law.

Instances of a husband being committed, till his wife should do an act: but where he made it appear he could not prevail upon her, he was discharged, [p. 848.] Award not to be set aside, because the arbitrator made use of the judgment of another person, (a) [p. 848.]

JOHN WASE being seised as tenant for life, with remainder to his six daughters, Anna Maria Emery, Elizabeth Dickin, Sarah Wase, Mary Wase, Margaret Wase, and Charlotte Wase, in tail, in default of issue male, a treaty was entered into for the sale of the estate to Richard Emery; and a memorandum of agreement, dated the 24th of March, 1797, was made; stating, that John Wase and his daughters agree and consent, that Richard Emery doth purchase at the valuation of John Bishton all the estate in the possession of John Wase or his under-tenants or assigns at Waters Upton, together

(1) *Gwynne v. Heaton*, 1 Bro. C. C. 1, 2; *Heathcote v. Paignon*, 2 Bro. C. C. 167. See *post*, *Emery v. Wase*, the next case; vol. vi. 273.

(a) See *Brown v. Bellows*, 4 Pick. 179; *Anderson v. Wallace*, 3 Clark & Fin. 26.

with all rights, privileges, ways, and every interest of whatever kind or sort soever; and that the said valuation shall be completed as soon as possibly convenient; and that the said Richard Emery be then put in immediate possession.

This instrument was executed by Richard Emery, John Wase, William Emery, his wife Anna Maria Emery, John Dickin for self and wife, and by the other daughters of Wase; and in Trinity Term, 1797, a recovery was suffered by Wase and his daughters, and the husbands of such as were married. Bishton by his report, dated the 26th of April, 1797, stating the valuation of the estate at 4610*l.* and the timber at 300*l.*, directed those sums to be paid upon the 25th of March next to John Wase and the other parties, agreeably to the articles of the 24th of March; provided a good title should be made; and that Wase should enter into an agreement with Richard Emery to deliver possession on the 25th of March next, except one room in the dwelling-house, the use of a yard, and pasture for eating and reducing into dung, the hay, straw, and fodder, of the last year's growth; with several other provisions as to the manner, in which the premises should be left, and as to the time and mode of payment.

The bill was filed by the purchaser for a specific performance of the agreement. The defence set up by all the Defendants, John Wase, his daughters, and the husbands of those two who were married, was, that Bishton had exceeded his authority by the direction as to the mode of payment, the time, at which the Plaintiff was to enter, and the manner, in which the land was to be in the
* mean time managed: these matters not having been re- [*847]
ferred; also, that the estate was very much under-valued; and an unlimited right of common, worth 10*l.* a-year, was not valued; that the estate had been since valued at upwards of 6000*l.* including the right of common; and the timber at 370*l.* They admitted, that the agreement had been signed by all the Defendants, except Elizabeth Dickin.

Bishton and several other surveyors were examined; and differed widely as to the value; some carrying it beyond 6000*l.* Bishton stated, that he took into consideration the right of common.

The cause having been argued by Mr. Piggott, Mr. Richards, Mr. Stanley and Mr. Benyon, for the Plaintiff, and by Mr. Lloyd and Mr. Hollist, for the Defendants, stood for judgment.

The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This cause is similar to the last (1); and comes on under very extraordinary circumstances; and I have very considerable doubts, whether my determination may not be considered as in some degree taking away from the authority, which an arbitrator chosen by all parties ever has had, and I hope ever will have, both at law and in equity: so that the transaction shall not be overhauled, unless upon fraud

(1) *Moth v. Atwood*, ante, 845.

and imposition or gross mistake (1) (a). But this case contains an ingredient, which justifies me in dismissing the bill without infringing upon that rule, or impeaching the character of the person chosen to value the estate; who is a very respectable man, and well skilled in his profession; and has conducted himself without any partiality; exercising his judgment, as far as he had the particulars of the estate before him. But this is a very extraordinary bargain to be the subject of a suit for a specific performance. The bill is filed against a father, tenant for life, and six daughters, entitled in remainder in tail. If he had sons, he could not have made a title: but the bargain proceeds upon the idea, that the daughters will be entitled after the death of the father; and he and the daughters, two being married, the rest unmarried, make a bargain to sell to the

[* 848] Plaintiff the estate at such a price *as Mr. Bishton should fix. This is a monstrous power, but such as persons have a right to give; and they must submit to the consequences, unless fraud or gross mistake is made out (b).

But I must look into the competence of some of these Defendants, as married women. I have no conception, that as against them such an agreement could be enforced; binding their interests by agreement; which could not be bound by conveyance. How far the husband is liable in damages for not making good the agreement, or how far in equity he will be compelled to prevail upon his wife, is another consideration. There have been instances of committing the husband to the Fleet, till the wife should do the act; and there was one instance, I think, where the husband stayed a great while in prison; and then made it appear, that he could not prevail upon her; and was discharged. This bill is resisted, not expressly upon this ground, I admit; but they refuse to carry the agreement into execution. The Plaintiff, insisting upon having a good title made, says nothing about the daughter, who did not execute the agreement,

(1) *Ante*, *Knox v. Symmonds*, vol. i. 369; *Morgan v. Mather*, *Dick v. Milligan*, ii. 15, 23, and note.

(a) To impeach an award, corruption, partiality, gross misbehavior, or some palpable mistake, must be shown in the arbitrators. *Schenck v. Cotterell*, 1 Green. Ch. 297; *Emerson v. Udall*, 13 Vermt. 477; *Strodes v. Patton*, 1 Brock. 228; *Mulder v. Cravat*, 2 Bay, 370; *Sumpter v. Murrell*, ib. 450; *Herrick v. Blair*, 1 Johns. Ch. 10; *Askew v. Kennedy*, 1 Bailey, 46; *Shephard v. Merrill*, 2 Johns. Ch. 276; *Goldsmith v. Tilley*, 1 Harr. & John. 361; *Bumpas v. Webb*, 4 Porter, 65; *Neal v. Shields*, 2 Pennsylv. 300; *Cleary v. Coor*, 1 Hayw. 225.

For other cases and the distinctions in reference to the causes for setting aside awards, see 1 Metcalf & Perkins's Dig. tit. Arbit. & Award, pl. 419, *et seq.*; *Head v. Muir*, 3 Rand, 122; *Ewing v. Beauchamp*, 2 Bibb, 456; *Morris v. Ross*, 2 Hen. & Munf. 408; *Campbell v. Western*, 3 Paige, 124; *Fitzpatrick v. Smith*, 1 Desaus. 245; *Shephard v. Merrill*, 2 Johns. Ch. 276; *Todd v. Barlow*, ib. 551; *Knox v. Symmonds*, *ante*, 1 V. 369, and note (a); *Price v. Williams*, ib. 364, note (a).

(b) A valid sale may be made for a price to be fixed upon by a third person, provided such third person make the estimation. If, however, such third person makes an estimation which is manifestly unjust, there will be no sale. Pothier, *Contracts of Sale*, p. 1, § 2, art. 2, § 2, pl. 24. See also as reference of price to the arbitration of third persons, *Brown v. Bellows*, 4 Pick. 189; *Long on Sales*, by Rand, 5; 1 Stair. b. 1, t. 14.

and can put an end to it at any time. One objection made is, that Bishton did not exercise his own judgment about the timber. That alone is not sufficient to prove the award bad; for a man may make use of the judgment of another upon whom he can depend; and the valuation of that person is his, if he chooses to adopt it (1). A more material thing, as to which there is considerable evidence, is, that the right of common was not taken into his contemplation; or, at least, that value was not put upon it that it deserved. Some of the witnesses for the Plaintiff even prove the value to be much more than that of Bishton. Valuers differ so much, that it is not very wise to agree to sell according to the valuation of any one. Some of the witnesses bring it above 6000*l*. Under these circumstances I am not bound to decree a specific performance; and the more so, because the Plaintiff has his remedy by action at law against Mr. Wase and those, who were competent to make the agreement; and may recover damages; and if he prevails in his action, he will be entitled as part of the damages to all the costs he was put to by Bishton's survey, &c.

Therefore, though I am extremely averse from interfering with an award, however I may differ from the arbitrator, or setting up any other opinion, without the circumstances, I have before alluded *to, yet, when I see a bargain of this sort, I cannot [*849] decree a specific performance. I have hardly ever seen a bargain without some data, upon which they should go: but a mere simple agreement to sell at whatever price a third person shall name is not such as the Court would be very desirous to enforce (2); and when I see, that some of the persons are not competent, I shall hold, that the Plaintiff has not made out a right to a specific performance. He has that, which is open to every one, a remedy at law for the breach of the agreement; to which remedy under the circumstances I shall leave him. Therefore under all the circumstances of this case the bill must be dismissed without costs (3).

1. THAT very strong grounds must be laid, to induce a Court to interpose, after a decision pronounced by the domestic forum which parties have themselves chosen; see, *ante*, the note to *Price v. Williams*, 1 V. 365; but Courts, both of Law and Equity, will interfere, not only when an award is tainted by fraud, but also, whenever it is indisputably clear that an award has been made under a mistake; see note 4 to *Knor v. Symmonds*, 1 V. 369.

(1) 2 Madd. 92.

(2) *Post*, *Hall v. Warren*, vol. ix. 605; *Gaskarth v. Lord Louther*, xii. 107; *Milnes v. Gery*, xiv. 400, 594, 595; *Blundell v. Brettargh*, xvii. 232; *Wilks v. Davis*, 3 Mer. 507; *Morse v. Merest*, 6 Madd. 26; *Gourlay v. The Duke of Somerset*, xix. 429; *Wilks v. Davis*, 3 Mer. 507; *Hopcraft v. Hickman*, 130; 2 Sim & Stu.; 1 Madd. Prin. 425.

(3) This decree was affirmed upon appeal to the Lord Chancellor, *post*, vol. viii. 505. See *Morris v. Stephenson*, vii. 474; *ante*, i. 329. As to the discretion of the Court to refuse a specific performance, see, *ante*, 734; [722, note (b)]; *post*, *White v. Damon*, vii. 30; ix. 608; *Mortlock v. Buller*, x. 292, 305; *Mason v. Armilage*, xiii. 25; *Hill v. Buckley*, xvii. 394; xviii. 111; *Howell v. George*, 1 Madd. 1; *Martin v. Mitchell*, 2 Jac. & Walk. 413.

had a domicil, that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances: both country houses, for instance, bought at the same time. It can hardly be said, that, of which he took possession first, is to prevail. Then, suppose he should die at one: shall the death have any effect? I think, not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country, in which the property is, would not let it go out of that, until they know by what rule it is to be distributed. If it was in this country, they would not give it, until it was proved, that he had a domicil somewhere.

[*792] * In these causes I am clearly of opinion, Lord Somerville was a Scotchman upon his birth; and continued so to the end of his days. He never ceased to be so; never having abandoned his Scotch domicil, or established another. The decree therefore must be, that the succession to his personal estate ought to be regulated according to the law of Scotland.

SEE the notes to *Bempde v. Johnstone*, 3 V. 198.

WRIGHT v. HUNTER.

[ROLLS.—1800, FEB. 5; 1801, FEB. 24.]

MONEY paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore a payment by the other on the same account after the bankruptcy cannot be recovered from the bankrupt; who had obtained his certificate: but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose; and the whole was recovered in an action against the bankrupt, who had obtained his certificate; the Defendant not having pleaded in abatement.

Though contribution among partners is now enforced at law, the jurisdiction of Courts of Equity is not ousted; (a) and therefore though the bill was dismissed, the object having been obtained in an action directed, the Court would not dismiss it with costs, [p. 792.]

ROBERT HUNTER, Margaret Hunter and Henry Keowen Hunter, who were copartners in business in equal shares, were in 1791 concerned with the Plaintiff in a ship: the Plaintiff being entitled to six twenty-fourth shares; and the Hunters to eighteen twenty-fourth shares. On the 8th of February, 1793, the Plaintiff settled the account of the outfit of the ship and cargo with Robert Hunter for himself and his partners; who were also, pursers and husbands of

(a) See Story, Partnership, § 320, 321, 322; Collyer, Partnership, (2d Am. ed.) 154-157; 1 Story, Eq. Jur. § 496, 504; *Sells v. Hubbell*, 2 Johns. Ch. 397; 1 Madd. Ch. Pr. (4th Am. ed.) 197, 233; *Chichester v. Vass*, 1 Munf. 98.

the ship; and the Plaintiff then paid to the Hunters the sum of 782*l.* 19*s.* 2*d.*; which was his proportion of the charge. On the 9th of October, 1793, the Hunters became bankrupts; and at that time the sum of 1638*l.* 8*s.* 8*d.* remained due on account of the outfit and cargo of the ship. After the bankruptcy it came out, that the Hunters had sold eleven twenty-fourth shares without the knowledge of the Plaintiff; and by agreement subsequent to the bankruptcy the debt of 1638*l.* 8*s.* 8*d.* was apportioned among the several owners; and the Plaintiff paid his proportion; amounting to 409*l.* 12*s.* 2*d.* The Hunters' share under that apportionment not being paid was subdivided among the other owners; and the Plaintiff also paid 168*l.* 13*s.* 4*d.*, his proportion upon that division.

Robert Hunter having obtained his certificate, the bill was filed against him for the purpose of being relieved against those payments made by the Plaintiff after the bankruptcy.

Mr. *Graham* and Mr. *Richards*, for the Plaintiff compared it to the case of a surety; and mentioned *Toussaint v. Martinant* (1).

* Mr. *Piggott* and Mr. *Cooke*, for the Defendant objected, that the assignees of the bankrupts and the other part-owners ought to be parties, for the purpose of ascertaining the contribution: but as, to avoid that difficulty, the Plaintiff goes only for these two liquidated sums, he can enforce that demand at law; to which he ought to have resorted after obtaining the discovery by the answer.

The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN] intimated an opinion, that the demand of 409*l.* 12*s.* 2*d.* was barred by the certificate; and said, that though this might be the subject of an action, a bill in Equity would also lie: but he would not without a trial at law determine this point; that a partnership creates an agreement, that in case any partner pays more than his share, the others shall indemnify him: a very important consideration in case of a bankruptcy; and the creditor, though he cannot come directly, may in that way come circuitously against the bankrupt by demanding it from the other partner first.

The case upon this went to the Court of King's Bench; where it was decided, that the action could not be maintained as to the sum of 409*l.* 12*s.* 2*d.*; but that the Plaintiff was entitled to have judgment for the other sum of 168*l.* 13*s.* 4*d.* (2).

When the cause came on again after that decision, the only question was as to the costs.

Feb. 24th. Mr. *Richards* for the Plaintiff insisted, that the bill should be dismissed without costs: the jurisdiction of this Court not being ousted; though actions are now maintained for a contribution between partners.

(1) 2 Term. Rep. B. R. 100.

(2) See the Report of the case in the Court of King's Bench, 1 East, 20; where the circumstances are more fully stated than is necessary upon this occasion.

2. If a vendor agree to sell, at such a price as certain arbitrators, named, shall subsequently fix; should they decline to make any award a Court of Equity will not assume their office, and a specific performance cannot be obtained. *Wilks v. Davis*, 3 Meriv. 509; *Gourlay v. The Duke of Somerset*, 19 Ves. 431; *Agar v. Mackleu*, 2 Sim. & Stu. 423. And if an award, under such an agreement, has actually been made, but not according to the circumstances of time and form prescribed; (*Cooth v. Jackson*, 6 Ves. 34; *Milnes v. Geary*, 14 Ves. 406;) or if (as in the present case, and in *Gourlay v. The Duke of Somerset*, before cited,) the valuation has not been properly and discreetly made; a Court of Equity will not interpose, but will leave the party, desiring to enforce the agreement, to make the most of it at law: unless, perhaps, in cases where there has been clear acquiescence by parties competent to bind themselves, with respect to the deviations from the prescribed circumstances; or the award has been in part performed. *Blundell v. Brettargh*, 17 Ves. 241; see note 5 to *Cooth v. Jackson*, 6 V. 12.

3. Mere inadequacy of consideration, is not sufficient ground for setting aside a contract; but the undervalue may be so gross as to afford of itself evidence of fraud; see note 2 to *Crouse v. Ballard*, 1 V. 215.

4. An agreement for sale, signed by a married woman, (not acting under a power duly executed, or some instrument making her, as to the subject of sale, a *feme sole*,) cannot be enforced: in the consideration of Courts of Equity, a married woman, (unless under the circumstances above indicated,) has no disposing power. *Wright v. Rutter*, 2 Ves. Jun. 676. And under a contract by husband and wife, for sale of the wife's estate, the modern doctrine, as in the principal case, seems to be, that the Court will not decree the husband to procure the wife to join in completing the sale which has not her own unbiassed approbation; *Martin v. Mitchell*, 2 Jac. & Walk. 426; *Mortlock v. Buller*, 10 Ves. 305; *Davis v. Jones*, 1 New. Rep. 269; though the principle of virtual compulsion on the wife does not appear to be absolutely repudiated: *Innes v. Jackson*, 16 Ves. 367; *Morris v. Stephenson*, 7 Ves. 479: and where it does not appear that the wife is unwilling to consent, there would be no reason for letting the husband recede from his covenant. *Howell v. George*, 1 Mad. 7.

KEMP v. KEMP.

[ROLLS.—1795, MAY 5, 7; 1801, MARCH 24.]

UNDER a power to appoint among several objects each must have a share, and, by the rule in equity as to illusory appointments, a substantial share; unless a good reason appears; as, another provision by the person executing the power, not from any other quarter. Under such a power an appointment of a fund, nearly 1900*l.*, among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory. (a)

Evidence, that an appointment was improperly obtained, being executed by a will regularly proved, was rejected, [p. 850.]

Powers in this Court considered as trusts, (b) [p. 856.]

Power to appoint to the use of such child or children, &c.: an appointment to one or more good, (c) [p. 857.]

Not now the rule, that under a power to appoint among several objects they must take equally, unless a good reason appears, [p. 859.]

A power to appoint among several objects well executed at law by giving each a share, however small, [p. 861.]

MARTHA SCATTERGOOD, by her will, dated the 29th of August, 1753, after giving several specific and pecuniary legacies, among others, to Isaac Kemp 20*l.*, to his son Anthony Facer Kemp a watch, and to his daughter Martha Seacombe a diamond ring, disposed of the residue thus:

“What remains after paying these legacies I give to my cousin Martha Kemp for her life and then to be disposed of amongst her children as she shall think proper.”

Martha Kemp, the wife of Isaac Kemp, and her son Anthony Facer Kemp were appointed executors.

After the death of the testatrix a bill was filed by Anthony Facer Kemp; under which several orders were made, and the residue was paid into the bank. Isaac Kemp died in 1775; and by his will, dated the 14th of February 1767, among other things giving a legacy of 50*l.* to Anthony Facer Kemp, reciting, that he had a few days before given him his fortune, or such sum as he thought a fair, competent proportion, he gave to his daughter Martha Seacombe * a legacy of 100*l.*, and to his son Samuel Scattergood Kemp 500*l.*; and appointed his wife executrix. [* 850]

Martha Kemp by her will, dated the 30th of August, 1785, as to, for and concerning, all such goods, chattels, estate and effects, as she was entitled to for her life under the will of Martha Scattergood,

(a) As to illusory appointments, see Sugden, Powers, (4th Lond. ed.) ch. 9, § 4, p. 491, *et seq.*; *Pocklington v. Bayne*, 1 Bro. C. C. (Am. ed. 1844,) 450, 451, and notes; 1 Story, Eq. Jur. § 252, 255; *Haynesworth v. Cox*, 1 Harper, Eq. 119, note (a).

Courts of Chancery are now relieved from this troublesome subject of illusory appointments, by statute of 1 Wm. IV. ch. 46; 2 Williams, Executors, (2d Am. ed.) 1019, 1020; 4 Kent, (5th ed.) 343, note; *Vanderzee v. Aclom*, ante, 4 V. 771, note (a).

(b) *Brown v. Higgs*, ante, 4 V. 708, note (a); *S. C.*, ante, 495, and notes; *Burroughs v. Philcox*, 5 M. & Cr. 73.

(c) Sugden, Powers, ch. 9, § 3, (4th Lond. ed.) 485, 486.

and which she was thereby empowered to dispose of after her decease to and amongst her children in such shares and proportions as she should think proper, gave and disposed thereof in the words following :

"I give, bequeath and dispose, unto my son Anthony Facer Kemp the sum of 50*l.* part thereof. I give, bequeath and dispose, unto my daughter Martha Seacombe, the wife of Richard Seacombe, the sum of 10*l.*, other part thereof, to and for her own sole and separate use and benefit absolutely ; and as to all the rest, residue and remainder, of such goods, chattels, estate and effects, of what nature or kind soever, I give, bequeath and dispose of the same and every part and parcel thereof unto my son Samuel Scattergood Kemp to and for his own use and benefit for ever."

She then appointed Samuel Scattergood Kemp sole executor ; and died in 1794 ; leaving only the three children mentioned in her will.

The fund, which was the subject of appointment, arising from the residue of Martha Scattergood's personal estate, amounted to nearly 1900*l.* This bill was filed by Samuel Scattergood Kemp, claiming under the appointment of his mother.

The Defendant Anthony Facer Kemp by his answer admitted, that at different times he received from his father 1901*l.* 14*s.* 7*d.* but denied, that he received the whole as an advancement in the world ; claiming an allowance, beyond what he had received, as a compensation for fifteen years' service, and also for two legacies of 100*l.* each, received by his father in his right. He stated a comparison of his circumstances with those of the Plaintiff. He admitted, that Martha Kemp lived with the Plaintiff till her death ; but denied, that she was maintained by him ; believing, he received dividends accruing to her ; and stating, that the Plaintiff [* 851] * also claimed several thousands pounds under her will, insisted that the appointment was illusory.

The Defendants Seacombe and his wife by their answer stated, that upon their marriage in 1753 he received from Isaac Kemp 400*l.* in part of 1000*l.* her portion ; and he received the remainder in 1779 under a decree, with interest, and also a gift from another person to his wife of 100*l.*, received with interest under the decree. He also received a legacy of 100*l.* ; given to her by her father's will. He stated, that the Plaintiff's circumstances were much superior to his ; and that he had sixteen children ; and he believed, the Plaintiff had received several sums from his father, besides being settled in business by him and the legacy of 500*l.*

Evidence was produced to show the other provisions made for the children. Evidence was also produced to show, that the instrument was obtained by undue influence and ill usage, which was proved by the Plaintiff's clerks and servants ; and opposed on his part by two witnesses ; who had attended the family as apothecaries : but the Master of the Rolls early in the argument declared,

that as the instrument was proved as the will, he should pay no attention to that evidence.

Mr. *Graham* and Mr. *Short*, for the Plaintiff.—This distribution cannot be impeached as illusory; especially taking into consideration the large sums advanced to the Defendants by their father. Though the objects are limited, the discretion is very large. Does any inequality vitiate an appointment under such a power: or, where is the line to be drawn? The author of the power in this instance was only the cousin of Martha Kemp; which is different from a power given by a parent; in which case it might be considered wrong, that the person to execute should have a power to disappoint the children of what they had a natural right to expect. The mother executing this power did not leave her other children destitute; and she lived twenty years with the son she has favored. *Wall v. Thurborne* (1). *Svetnam v. Woolaston* (2). It is said in that case, though not decided, that there must be something like bribery or corruption. *Menzey v. Walker* (3). *Lister v. Robinson* (4). * *Austin v. Austin* (5). *Burrell v. Burrell* (6) is very strong for the Plaintiff. The words are almost those of this power. One guinea only was given to the son; and though it was observed, that the father creating the power to give to his children, generally, might have known of the other provision the son had, his bill was dismissed. In *Spring v. Biles* (7) the power of the wife was to give to and amongst such of his relations as should be living at the time of his decease in such parts, shares, and proportions as she should think proper: and an exclusive appointment was established, and Lord Mansfield observed upon the cases of powers to devise among children, that the reasoning is very subtle; for the person will have duly executed the power by giving a shilling to every one but a favorite and the whole to such favorite. In *Boyle v. The Bishop of Peterborough* (8), a power to appoint among all the children, one of two children being dead, it was held, that the whole might be appointed to the survivor. *Gibson v. Kiven* (9) is against the Plaintiff: but Pemberton, afterwards Chief Justice, thought, the power was not exceeded, though only 5s. was given to one: and the case is weakened; because it appears in *Wall v. Thurborne*, that the wife was married to a second husband; and being under coverture, her distribution might be influenced by his authority.

Mr. *Lloyd* and Mr. *Fonblanque*, for the Defendants.—No motive is stated upon this will, nor any reason given, for making an unequal

(1) 1 Vern. 355, 414.

(2) Cited 1 Vern. 356.

(3) For. 72.

(4) Cited For. 74.

(5) Cited For. 74.

(6) Amb. 660.

(7) 1 Term Rep. B. R. 435, n.

(8) 3 Bro. C. C. 243; *ante*, vol. i. 299.

(9) 1 Vern. 66.

distribution ; and the point is, whether under such a power she could make such distribution : assigning no reason for so doing. For that there is no authority. What is said in *Spring v. Biles*, that one child may be excluded, or a favorite child take the whole, if a shilling is given to each of the others, it must be remembered, was said in a Court of Law : as applied to this Court it is certainly wrong. In *Mensey v. Walker* Lord Talbot held, that by such a power the objects are fixed ; and each child must have a substantial part. The expression "amongst her children" must be read "amongst all her children ;" in which case no one could be excluded. *Burrell v. Burrell* is different. The power was neither to give to all and every the child and children, nor amongst the children. Lord [*853] Camden might have been of opinion, that it might be construed a power to give to any of the children ; and from the reason given there must have been more in the case ; upon which the execution was considered reasonable. The question then is, whether in this Court this is not equal to total exclusion. The constant rule of this Court, to be found in *Gibson v. Kinven* and many other cases before and since, has been, that a distribution very unequal and without any good reason to warrant it shall not prevail. *Wall v. Thurborne*. *Cragrave v. Perrost* (1). *Astrey v. Astrey* (2). *Coleman v. Seymour* (3). *Maddison v. Andrew* (4). *Alexander v. Alexander* (5). *Pocklington v. Bayne* (6) ; all these, followed by the late cases (7), affirm the rule against illusory appointments. A power of appointment confers a trust ; and like every other trust it must be executed according to good faith. In *Gibson v. Kinven* the words were as large as in this will ; upon trust and confidence, that she would not dispose thereof but for the benefit of her children : but it was set aside on account of the inequality of the distribution, for which there was no good reason. It must be admitted upon that, that if there were circumstances in the conduct of a child, sufficient to exclude that child, those circumstances would have operated in Equity as a reason for the exclusion ; but how can this Court form a judgment, if the question of influence upon the parent's mind is excluded ? According to a manuscript note of Lord Nottingham's reasoning in *Gibson v. Kinven*, his Lordship said, there could be no certain rule in the exposition of powers of this nature ; but it ought to vary according to the circum-

(1) 1 Eq. Ca. Ab. 345, cited in *Wall v. Thurborne*, 1 Vern. 355.

(2) Pr. Ch. 256.

(3) 1 Ves. 209.

(4) 1 Ves. 57.

(5) 2 Ves. 640.

(6) 1 Bro. C. C. 450.

(7) The cases, that have occurred in the course of these Reports, comprising this and most of the other points relating to powers of appointment, and referring to the leading authorities, are *Boyle v. The Bishop of Peterborough*, ante, vol. i. 299 ; *Bristow v. Warde*, *Wilson v. Piggott*, *Routledge v. Dorrel*, *Whistler v. Webster*, *Smith v. Lord Camelford*, ii. 336, 351, 357, 698 ; *Crompe v. Barrow*, *Vanderzee v. Adom*, iv. 681, 771 ; *Wollen v. Tanner*, *Spencer v. Spencer*, *Long v. Long*, *Fortescue v. Gregor*, *Reade v. Reade*, 218, 362, 445, 553, 744 ; *Kenworthy v. Bate*, post, vol. vi. 793. See the note, ante, i. 310.

stances of the case ; and though the clause sounds never so arbitrarily, yet the power ought to be executed like arbitrations, with equity and good conscience ; for generally in these cases the best equity is equality. The principle to be deduced from this is, that you are to execute the power as the author of it would, if living. Whenever the power is so framed, that each child is entitled to something, they must take equally, unless there are circumstances, from which it is likely, the *author of the power would [* 854] have executed it unequally. If you can go into evidence to justify the inequality, you can go into evidence on the other side to explain. The principle as to powers and trusts is the same (1): both are for the benefit of the object, not of the person to execute, or of the trustee. *Warburton v. Warburton* (2). In *Thomas v. Thomas* (3) the distinction is taken between the words there, to one or more of his children then living in such manner as his executrix should think fit, and a general trust to distribute among the children ; in which case an unequal distribution may be controlled by a Court of Equity. *Clarke v. Turner* (4). *Moseley v. Moseley* (5). In *Baker v. Barret* (6) upon the word "amongst" the distribution was ordered to be among them equally : there being no reason against it. In *Maddison v. Andrew* Lord Hardwicke stating, that where but a trifle has been given to one, it may be justified, if that child by misbehavior deserved it, qualifies it by observing, that it must be very gross indeed. This argument proceeds exactly upon the notion of Lord Thurlow (7) in *Boyle v. The Bishop of Peterborough*, that an illusory appointment is a fraud. There must have been extrinsic evidence to justify that apparent unequal distribution. What this testatrix has done is what Lord Thurlow calls fraud.

Mr. *Graham*, in reply.—I deny, that powers are trusts (8), and draw along with them all the consequences of equitable jurisdiction. It has been long said, that powers and the construction of them are the same both at law and in Equity. If a power has been executed by will, the Court always refers it to Ecclesiastical cognizance ; and the probate is always considered conclusive. This, though an execution of a power, is a mere will.

The introduction of powers not being very remote, the cases do not go back to a very distant period. The earliest, deserving attention, is *Cragrave v. Perrost*. At that time the expression "an illusory appointment" was not introduced : but it was thought an improvident execution ; like fraud ; and not such as the person creating the power would have approved. If a Court of Equity will place

(1) See *Brown v. Higgs*, ante, 495 ; vol. iv. 708.

(2) 1 Bro. P. C. 34.

(3) 2 Vern. 513.

(4) 2 Freem. 196.

(5) Cited 2 Freem. 198.

(6) Cited 2 Freem. 198.

(7) Ante, vol. i. 310.

(8) See *Brown v. Higgs*, ante, 495 ; vol. iv. 708

itself in *loco parentis*, to judge of the reasons justifying the inequality, they must assume the consideration of those circumstances, that would govern the conduct of the parent. According to the expressions in *Wall v. Thurborne* to make an appointment illusory, the circumstances must be strong: and the instances put are bribery and corruption. That shows, how loose the grounds were then. What is said in the ultimate decision of that case, that, because there is any inequality, and because it is discretionary in the Court to relieve, or not, the Court would take upon themselves to set it aside, is much too broad.

In *Maddison v. Andrew* Lord Hardwicke considered, that for that purpose the proportion must be a mere nothing, a mockery; which would not apply to 100*l.* out of 1100*l.* In *Menzey v. Walker* Lord Talbot admitted, that if the question turned upon the reasonableness or unreasonableness of the execution, he must inquire into the circumstances of the two daughters; that is, how they were provided for. In *Alexander v. Alexander* the construction was, that necessarily every person must have had a part; and Sir Thomas Clarke must have so understood it; who has therefore held an appointment of 100*l.* out of 6000*l.* not illusory; which was scarcely a greater proportion than the 10*l.* in this appointment. In *Pocklington v. Bayne* undoubtedly the proportion of one acre to two children for life was a mere mockery. In *Burrell v. Burrell* there is good reason to suppose, Lord Camden did not determine upon the ground represented in the Report, but upon this: that the Court ought with great hesitation to entertain a jurisdiction of that sort, to exercise a judgment in *loco parentis*. In *Spring v. Biles* Lord Mansfield must have been speaking of cases in Equity: no such case having occurred at Law. His impression and that of Mr. Justice Buller were plainly, that the exact shares are not to be looked to.

MASTER OF THE ROLLS, [SIR RICHARD PEPPER ARDEN].—The only point for my opinion is, that according to this power Martha Kemp was bound to give something more than a shadow to all her children; and that 10*l.* is not in itself, independent of circumstances, illusory; or, if it is, that, taking all the circumstances together, it cannot be held to be so. In the old cases they used to go into the point, how the children behaved: but they do not now; and I will not.

[*856] *March 24th.* The MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN].—This cause has been before me, longer, I believe, than any other; and certainly should not have remained so long for judgment, if I had not entertained doubts, which I must always entertain upon questions of this sort, as to the decree I am to make. Another reason is, that I hoped, what I recommended, that the parties should come to some agreement, would have taken place. That is extremely desirable; for nothing is more disagreeable to a Judge than to make the decision I find myself under the necessity of making.

This cause arises upon what has frequently been a question in this Court: the due execution of trusts, and powers, which are in this Court considered as trusts (1). The question is, whether under the circumstances of this case this appointment can stand; for special circumstances were relied on, and a great deal of evidence produced to show, what provisions these children took from their father and others: but I do not think that material now; for it affords no ground to entitle the person executing the power to take away from them what upon the construction of the power they might be entitled to: that is, a real substantial share of this fund. The property is pretty nearly 1900*l*. I should hardly have conceived, that 50*l*. could be considered a substantial part: but the sum of 10*l*. to the daughter was evidently meant to be no gift: the mother merely supposing herself to be under the necessity of giving something to each. The first point is as to the construction of the power. One of the Counsel for the Plaintiff was much disposed to admit that this must be construed to be a power under such circumstances as called upon her to give some share to each: the other Counsel insisted, and, I think, so far rightly, as being the most material point, that according to the true construction of this power, notwithstanding the very rigorous manner, in which these powers have been construed in this Court, it was an absolute power of disposition; and she might have given the whole to Samuel Kemp. The question is, what is the real construction of these words; "then to be disposed of amongst her children as she shall think proper:" whether according to the true construction of this, which must be admitted to be a trust, so that she could only give it to a child, she might give it to one only, and that would have fulfilled the intention. I was for some time disposed to think, such a construction might be put upon it. The *case relied on was *Burrell* [*857] *v. Burrell*, decided by Lord Camden, a very great Judge: but when that case comes to be considered, there are many essential differences. The question then is, whether according to the true construction in law and equity upon a trust to dispose among a certain, given, assigned, number of particular persons each of those persons is not to be considered as entitled under that; and after looking through every case, that was cited, I am forced to declare, I find it to be the opinion of a series of Judges from Lord Nottingham to the present time, that words like these amount to a gift to all the objects; and the exclusion of one is an undue execution. If the words were "to such of her children as she shall think proper," that would give a latitude to appoint to one only.

All the questions, that can arise upon these words, seem to have been considered in the case of *Swift v. Gregson* and the case of *Spring v. Biles* in the note; from which may be collected the construction, which Courts of Law put upon powers of this nature.

(1) *Brown v. Higgs*, *ante*, 495, [and the notes]; vol. iv. 706. See *post*, vol. viii. 570, 1.

The words in the former of those cases were "to and for the use and behoof of such child and children of the said John Gregson," as John Gregson should at any time by deed or will, &c. limit, direct or appoint. The question was, whether such words gave a power to appoint to any one in exclusion of the others. The words in *Spring v. Biles* were "to and amongst such of my relations as shall be living at the time of my decease in such parts, shares, and proportions, as my said wife shall think proper." The Judges were of opinion, that these words gave full power to give to one or more; and most of the cases, that have arisen upon words of this sort, are there quoted; as *Thomas v. Thomas* (1); where the words were "to one or more of his children;" *Tomlinson v. Dighton* (2), where it was "to any of his children;" *Macey v. Shurmer* (3), "amongst all or such of his children;" and *Liefe v. Saltingstone*, (4) "to such of my children." All these words were held, and very properly, to show a manifest intention to give a power to appoint to any one child, that should answer the description. But it does not appear to have been argued, at least not conceded, that the word "amongst" has not been considered equivalent to "all and every;" which words are mandatory; and make it [* 858] *necessary, that each should have a share. It seems to me, that upon the case now before the Court the Judges would have had no doubt, that every one must have taken a share.

I will now state the cases, that have occurred upon this subject, chronologically; and see how far the opinions upon this question of illusory appointment, and I lament extremely, that it has ever found its way into this Court, have been carried. The case, that settled this, is *Gibson v. Kiven* (5), determined by that great Judge Lord Nottingham, styled the Father of Equity. It was contended in that case, that any one might have been excluded. It is said in the Report to have been the opinion of Chief Justice Pemberton, then at the bar, that a ring might have been given to one; and so it might, if this would be good: but the appointment was set aside by Lord Nottingham for inequality. How can the words in that case be distinguished from "amongst her children?" Lord Nottingham was of opinion, it was necessary to give some part to each; and a nominal part would not satisfy the object of the power.

That case was followed by *Wall v. Thurborne*, reported in two places in Vernon (6): but that book is unfortunately so inaccurate, that I do not know upon which statement to rely. If I take the first statement, it is very near this case.

Two other cases are quoted there, by whom determined I do not know: *Cragrave v. Perrost*, and *Sweetnam v. Woolaston*. Upon the

(1) 2 Vern. 513.

(2) 1 P. Wms. 149.

(3) 1 Atk. 389.

(4) 1 Mod. 189; 2 Lev. 104; Carter, 232.

(5) 1 Vern. 66.

(6) 1 Vern. 355, 414.

first I rather think the Court would have paused, before they would have set that aside, but for the peculiar circumstances. But *Swetnam v. Woolaston*, if it is to have any authority, would be against the decision in *Gibson v. Kinven*. It is a decision departed from in the principal case, and by whom determined I do not know. Therefore it is not entitled to be considered as of any authority.

Clarke v. Turner (1) was, I believe, determined by Lord Somers. Whether, or not, the Court was struck with the extent of the word "relations," and the subject being land, they took upon themselves to execute the trust; and decreed it to the heir at law.

*The next case is a very extraordinary one: *Warburton* [*859] v. *Warburton* (2): a power to two of the testator's daughters, whom he appointed his executors, to dispose to the use of themselves, their brothers and sister, or to such of them and in such proportions as they should judge fit and convenient according to their needs and necessities. There the Lord Keeper Wright and the House of Lords seem to have thought that the trust devolved upon the Court. The reason is a very odd one. I hope they did not lay much stress upon his being bred to the law. It is hardly to be collected, what construction they put upon it. It seems, as if they exercised the power themselves: a power, which of late the Court has disclaimed; and I hope, that will always be followed. If the power is not executed properly, the rule now is to set aside the execution and give the fund equally. But I suppose, the construction there was, that it was a general trust, to be exercised for their own benefit; and therefore the Court was very jealous; and completely controlled it.

The next cases are *Thomas v. Thomas* (3) referred to in *Swift v. Gregson*, and *Astrey v. Astrey* (4). The former could admit no doubt; and it was determined, that the fund might be given to one: the power being to give to one or more, there was no room for the Court to interfere. In *Astrey v. Astrey* the power was to divide among his three daughters in such proportions as the wife should think fit; and the Court was of opinion, it must be equally; unless a good reason appeared. That I take not to be the rule of the Court now. However, it is perfectly clear, that under words of this sort, if some very good reason does not appear, which I admit might be given in the particular case, for giving a very small sum to one, such a disposition cannot be allowed.

Then we come to some cases more modern; and upon which the rule is settled, as it now stands. In *Menzey v. Walker* (5), notwithstanding the reason given, namely, the provision from the grandfather, yet Lord Talbot thought, under the words in that case every

(1) 2 Freem. 198.

(2) 1 Bro. P. C. 34.

(3) 2 Vern. 513.

(4) Pr. Ch. 256.

(5) For. 72.

one must have a share, and not an illusory share. The next case is *Maddison v. Andrew* (1). The principal point does not [* 860] *bear upon this; but this was held clearly, that each of the objects living was entitled to a share; and that no discretion in such a case devolved upon the Court. Then in *Coleman v. Seymour* (2) it was held, that a share must be given to each; and that, a share not illusory. The next is a case very often quoted, *Alexander v. Alexander* (3); which seems almost to decide upon such words as these. Under a power to appoint unto and among such children begotten between them and in such proportion as she shall direct, &c. Sir Thomas Clarke held, that each must have some share; and that must not be a nominal share.

The last case I shall take notice of is that, which has been so much commented upon, *Burrell v. Burrell* (4). The testator gave all his real and personal estate to his wife, to the end she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other. The son had an estate of 400*l.* a year. The wife gave two daughters 200*l.* each; to the son a guinea; and the remainder to two other daughters. It is impossible to suppose that Lord Camden laid any stress upon the guinea. I cannot conceive, that he considered that as any thing; for it is now too well settled, and it is imposed on every Judge as an obligation, whatever may be the inclination of his own opinion, that, though a gift of any part is a good execution at law, yet in equity, unless it is substantial and real, it is the same as no execution. The words of the report leave it a little doubtful. It states two reasons; and concludes, that, Lord Camden being of the same opinion, the bill was dismissed. Lord Camden, as I conceive, was of opinion, that these words were so ample, that if she thought fit to give nothing to one, she might so execute her power. I will not say what my own opinion would have been. I am willing to subscribe to that of Lord Camden upon such a doubtful question; being perfectly satisfied, that in setting aside these appointments, criticising upon the words "to and amongst," &c. and the rule as to illusory shares, the Court goes against the intention. I must therefore think, that under the words of that will Lord Camden thought, the wife might have given the whole to one child; and had a right to exclude any, who in her opinion did not want it. Then ought that to have any effect upon these words? I think not.

[* 861] *My inclination is strong to support the execution of this power, if I could consistently with the rules I find established. Finding those rules established, I must consider these words with reference to those rules. This is a trust beyond all question. What is the effect of the words "amongst her children?" Is

(1) 1 Ves. 57.

(2) 1 Ves. 209.

(3) 2 Ves. 640.

(4) Amb. 660.

it necessary to say "all and every?" *Alexander v. Alexander* and the cases quoted in *Swift v. Gregson* plainly show, that, if it was not for the word "such" the word "amongst" would require a distribution, so that every one must take some share. A Court of Law says, a share, however little, will be sufficient. The power must be executed according to the words: if not, it will be bad at law. I shall mention *Pocklington v. Bayne*, in order to show that Lord Thurlow's opinion was the same. His Lordship held an acre given to two for their lives was illusory; evidently adopting the rule; which is too firmly established for a Judge to extricate himself from it. I wish to consider these cases as going upon the ground of fraud. I do not notice the late cases; principally because most of them were determined by me: but all of them, *Bristow v. Warde* (1), *Wilson v. Piggott* (2) and *Vanderzee v. Aclom* (3), are upon the same principle.

I am sorry, I have taken so much time upon this cause: but it proceeded from an earnest wish, that the parties would compromise it. My conclusion upon it is, that, notwithstanding the large words, every child must have a share; and the mother was bound to dispose of the fund so as to give every one a share. She has done so: but the share given to her daughter, for which no reason appears, sufficient to justify the mother as a trustee, is not sufficient. All the provisions from others will not do to exclude her from this fund; for Mrs. Scattergood has said, each shall have a share. If the person, not the person creating the power, but the person having the execution of it, has provided for them in some other way, that is sufficient; according to the Lord Chancellor's opinion (4); of which I shall always be glad to avail myself. But in this case I am under the necessity of adhering to the rule, established by such Judges, that it would be a presumption to attempt to get out of it; and under that obligation I must decide, that Martha Kemp was bound to dispose of this property, and to give a substantial share to each child; and that the words are not large enough to enable her to give only to one. Though I had *some doubt as to that, I am [* 862] satisfied now, I cannot make that construction; and am bound to give it among all. I am also bound to say, the bequest of 10*l.* was clearly meant as an illusion and not an execution. Therefore the execution is void. It is in vain now to lament, as I have in many other cases, that this Court did not follow the rule of law: but now this is so settled, that no Judge will, and certainly I will not, presume to go against it. The Court must decide, whether the share is substantial or not.

For these reasons, but with less satisfaction than I have had in any other judgment I have given, being satisfied, the party creating the

(1) *Ante*, vol. ii. 336.

(2) *Ante*, vol. ii. 351.

(3) *Ante*, vol. iv. 771.

(4) See *Bristow v. Warde*, *ante*, vol. ii. 336; *Spencer v. Spencer*, *ante*, 362, and the note, 368.

power, meant a much larger power than I can hold the person executing it had, I must declare this appointment void.

1. WHEN a mere discretionary power has not been exercised by the donee of such power, a Court of Equity has no right to interpose; but when a power of disposition was coupled with a trust, there, if the proper party has neglected that duty, the Court will execute it; see, *ante*, note 2 to *Bull v. Vardy*, 1 V. 270; though in making distribution among the objects of the power, the Court will be precluded from the exercise of discretion, given to the trustee personally, with respect to the proportions to be assigned to each object of the power; see notes 4 and 5 to *Brown v. Higgs*, 4 V. 708.

2. As to the doctrine of illusory appointments; see notes 3 and 4 to *Hockley v. Maubey*, 1 V. 143; and notes 2 and 4 to *Boyle v. The Bishop of Peterborough*, 1 V. 299.

BROWN v. CARTER.

[ROLLS.—1800, DEC. 1, 11; 1801, MARCH 24.]

A SON, tenant in tail, in remainder, when just of age, in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3000*l.* for the father, and resettling the estate; the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. (a) Upon that ground a bill by trustees under a general trust for his creditors, claiming as purchasers under the stat. 27 Eliz. c. 4, was dismissed; without deciding, whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth.

By indentures of lease and release, dated the 16th and 17th of February, 1746, Abraham Gapper, serjeant at law, conveyed all his estates in the counties of Wilts and Somerset to trustees and their heirs; as to the Wiltshire estates, to the use of himself for life without impeachment of waste; remainder to the use of Mary, his wife, for life; remainder to the use and intent, that the trustees should pay certain annuities to their daughters for their respective lives; and as to the Wiltshire estates, subject to such annuities, to the use of Henry Gapper, the eldest son of Serjeant Gapper and Mary his wife, for life without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; remainder to the use of Robert Gapper, the second son of Serjeant Gapper, for life, and to his first and other sons in the same manner, with similar remainders to Richard the third son, and his first and other sons; remainder to the daughters of Serjeant Gapper, as tenants in common in tail general, with the ultimate limitation to Serjeant Gapper in fee.

(a) See *Sterry v. Arden*, 1 Johns. Ch. 261, 271, 272; *S. C.* 12 Johns. 536; *Huston v. Cantril*, 11 Leigh, 136; *Whelan v. Whelan*, 3 Cowen, 538; 3 Sagden, Vend. & Purch. (6th Am. ed.) 209, [298]; *post*, 879, note.

The uses of the Somersetshire estates were declared, as to one fourth, to Serjeant Gapper in fee; and as to the other three * fourths to his three sons respectively in tail male; [* 863] with cross-remainders; and the ultimate limitation to Serjeant Gapper in fee.

The settlement contained powers of jointuring and leasing to the three sons when in possession; and a power to Serjeant Gapper to revoke the uses.

Serjeant Gapper died in 1753. His widow died in 1762. Henry Gapper died in 1767, without leaving any issue; and all the daughters of Serjeant Gapper also died without issue.

Robert Gapper by his marriage in 1754 with Honora Sneyd, had issue two sons, William Gapper and James Webb Gapper. The eldest son William Gapper having attained the age of twenty-one on the 15th of December, 1768, upon the application of his father, who was then in distressed circumstances, consented to join in suffering a recovery to bar the entail, and to limit the estates for a term of years in trust to raise any sum not exceeding 3000*l.* for Robert Gapper, and to answer his then occasions. Accordingly by indentures of lease and release, dated the 20th and 21st of January, 1769, and a recovery suffered in pursuance thereof, all the estates in Wiltshire and Somersetshire, wherein they or either of them were seised of any estate of freehold or inheritance, were conveyed to Thomas Carter and his heirs, to the use of trustees for the term of two thousand years, upon trust by sale or mortgage to raise any sum not exceeding 3000*l.*, and pay the same to Robert Gapper; and after the expiration or other sooner determination of the said term, and in the mean time subject thereto and to the trusts thereof, to the use of Robert Gapper and his assigns for his life without impeachment of waste; remainder to the use of William Gapper and his assigns for his life without impeachment of waste, remainder to the use of Thomas Carter and his heirs during the life of William Gapper, in trust to preserve the contingent uses; remainder to the use of the first and other sons of William Gapper successively in tail male; with similar remainders to James Webb Gapper for life, and to his first and other sons in tail male; remainder to the use of Robert Gapper, the father, his heirs and assigns for ever.

This settlement contained a power to the son, when in possession, to jointure and provide portions, and also powers to the * father to jointure a future wife; and to settle the man- [* 864] sion-house, but subject to waste, upon his present wife.

In July 1769 the sum of 3000*l.* was raised by mortgage under the term; which sum was wholly paid to Robert Gapper, the father, or applied to answer his then occasions.

By indentures of lease and release dated the 13th and 14th of December, 1776, reciting the indentures of January 1769, and the mortgage, and that William Miller, the mortgagee, had lent Robert Gapper a farther sum over and above the 3000*l.*, and that there was then due to Miller 3840*l.* and that Dagge More had agreed with

Robert Gapper for the purchase of his estate for life and the ultimate reversion or remainder in fee of and in the said estates comprised in the said several indentures, Robert Gapper in consideration of the sum of 100*l.* and an annuity of 70*l.* a-year during his life conveyed the Wiltshire and Somersetshire estates to More, his heirs and assigns, as to a capital messuage, called Balaam House and other premises, part of the Somersetshire estates, to the use of Robert Gapper for ninety-nine years, if he should so long live, and as to all other the Somersetshire estates to the intent that Robert Gapper should receive the said annuity of 70*l.* a-year, with powers of entry and distress for securing the same; and as to the premises comprised in the term of ninety-nine years, from the determination thereof and subject thereto, and as to all other the premises thereby conveyed, to the use of More, his heirs and assigns for ever, subject to the annuities under the settlement of 1746, the term of two thousand years, the mortgage, an annuity granted by Robert Gapper during his life, and to the subsisting leases.

In February 1783 William Gapper, in consideration of 100*l.* then paid and 100*l.* to be paid by him within twelve months after the decease of Robert Gapper, purchased More's interest in the estate for life of Robert Gapper and the reversion in fee.

In 1783 James Webb Gapper died without leaving issue. In 1793 Robert Gapper the father died. William Gapper married in 1779; but he had no issue; and about fifteen years before the bill was filed he was separated from his wife; a deed of separation [*865] having been executed. His wife during the greatest part of that period has resided in America; where she possesses considerable estates.

By indentures of lease and release, dated the 12th and 13th of July, 1799, reciting, that William Gapper was indebted to the several persons in the several sums set opposite to their names in the schedule thereto, and that being desirous to discharge all his said debts he had proposed at a meeting, which he gave notice to all his creditors to attend, to vest his Wiltshire estates, which were valued at more than the amount of all the debts comprised in the schedule, in trustees for that purpose; and also reciting, that he was possessed of the Wiltshire estates, subject to a mortgage of 3000*l.*, for his life, with remainders to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to himself in fee; and that he had no issue male, and had been upwards of fifteen years separated from his wife; who had during the greater part of that time resided in America; where she was possessed of considerable estates, that were settled upon her for her separate use, and that a deed of separation had been executed by him and his wife, he for more effectually securing to his several creditors the payment of their debts, set opposite their respective names in the schedule, conveyed the Wiltshire estates to Thomas Brown and other creditors, their heirs and assigns; upon trust with all convenient speed to sell, and pay the mortgage debts of 3000*l.* and 100*l.* and

all his other debts, that should be proved due to the persons mentioned in the schedule; and to pay the residue of the purchase money, if any, to William Gapper, his executors, &c. It was provided, that in case any doubt or difficulty should be made respecting the title of William Gapper to sell the fee-simple and inheritance, the trustees should institute any suit, or make application to Parliament to authorize and compel the then trustees or trustee to preserve contingent remainders during the life of William Gapper and all other proper parties to join in the sale and conveyance.

The bill was filed by the trustees under that conveyance on behalf of themselves and all other the creditors of William Gapper against Carter, the trustee under the settlement of January 1769, and William Gapper, Dagge More, and the assignees of the mortgage for 3000*l.*; and the prayer of the bill was, that the Plaintiffs * may be enabled to carry the trusts into execution; and [* 866] for that purpose that all the Defendants may be decreed to join in a sale and conveyance.

It did not appear, that any settlement was made upon the marriage of William Gapper; and it was said, that all the property of his wife's, which was considerable, was upon the separation settled to her separate use.

The MASTER OF THE ROLLS, [Sir RICHARD PEPPER ARDEN], directed the Counsel for the trustee to support the interest of the children of William Gapper; supposing he should have any; observing, that the Court could not take into consideration, that in all probability there will be no children; and though there could be little doubt, that this settlement would have been set aside, if the son had come soon, it would be difficult at this distance of time; the son having married; and the wife supposing him tenant for life, with remainders to her first and other sons in tail male.

Mr. *Richards* and Mr. *Plowden*, for the Plaintiffs. The object of this bill is to set aside this settlement of 1769, operating to the prejudice of the son and of creditors. It is a hard settlement with respect to the son, and certainly a voluntary settlement; and which under the circumstances ought not to have been made. The trustees are purchasers for valuable consideration. Besides that, it is impossible not to see, that improper advantage was taken by the father. It may certainly be sometimes an advantage, and even laudable, to reduce a son to be tenant for life: but it is natural to ask, what was the consideration. If he had a view to make a provision for his brothers and sisters, as in *Kinchant v. Kinchant* (1); even, if it was to make a provision for his father, the Court would not weigh it in golden scales. But there ought to be a degree of attention applied, when the Court finds him doing an act considerably to his own prejudice the moment he has a capacity to do it. The father acquires a considerable property. It does not appear, that he advanced money to his son beyond his means, to pay debts, or for any other

(1) 1 Bro. C. C. 369.

purpose ; but the deed merely states, that 3000*l.* was to be raised for the benefit of the father ; who was only to keep down the interest. It is natural to ask the reason of all this. The father [* 867] without any reason thinks it proper to make a * provision for a second son. The eldest son by being made tenant for life gets nothing in any shape. No alteration of any sort was proposed in his favor. His estate was not accelerated ; and no provision was made for his maintenance during the life of his father. The effect of the settlement was all against him. That of itself requires some investigation. It would have been difficult for the father or the brother to have supported this deed against the eldest son ; who came of age only a month before the execution. It is obvious, that improper influence was used. No provident man could have executed this deed. The father had an additional interest by lessening the number of objects to take, and thereby accelerating his own remainder. The circumstances of the marriage under this settlement and the length of time are certainly, as the Court has observed, strong against the Plaintiffs. But the marriage was not had upon the faith of that settlement. If at the time of the marriage he had produced the settlement, by which he appeared to be tenant in tail or tenant in fee, and he turned out to be tenant for life only, that would be a case of great hardship, and might be represented as a fraud upon the wife and the issue ; but it is a better thing, generally speaking, for the wife and children, except the eldest son, that the father should be tenant in tail or in fee, than tenant for life only (1). There is no fraud therefore upon the wife or issue to be inferred on that ground ; supposing the case to stand only upon the validity of the instrument. With respect to the acquiescence, the father lived till 1793 ; and during his life the son had no means of asserting his right. During his father's life he had nothing but the remainder expectant upon the death of his father ; who had induced him to do this in 1769. Without any property of his own, and separated from his wife, who lives in America, he could not have had the means of asserting his claim.

The other ground, upon which this bill is filed is, that it is a voluntary settlement ; and as such void against purchasers within the Statute 27th Eliz. (2). It cannot be brought within the Statute 13th Eliz. (3) ; as probably the son at that time had not many creditors (4). The opinion thrown out by Lord Mansfield in *Doe v. Routledge* (5) was not adopted in other cases. There is

(1) In this part of the argument it was supposed, that the settlement of 1769, gave the son no powers of jointuring and providing portions ; upon which considerable stress was laid : but upon looking into the deed it was found to contain such powers.

(2) c. 4. See as to purchasers, *Doe*, on the demise of *Olley v. Manning*, 9 East, 59 ; *Hill v. The Bishop of Exeter*, 2 Taunt. 69 ; *Pulvertoft v. Pulvertoft*, post, vol. xviii. 84, and the note, 86.

(3) c. 5.

(4) See *Lush v. Wilkinson*, ante, 384, and the references.

(5) Cowp. 705.

no doubt, a voluntary settlement is void against purchasers for valuable consideration; and though creditors cannot at this time shake this settlement made in 1769, these trustees for creditors are in a different situation; standing here as purchasers for valuable consideration. In *Grant v. Edes* (1) the Court interfered for subsequent creditors in a stronger case. *Girling v. Lowther* (2), *Davies v. Weld* (3), *Platt v. Sprigg* (4), *Basset v. Clapham* (5).

Mr. *Heald*, for the Defendant Carter, the Trustee. This deed of 1769 stands upon, not only good and meritorious, but valuable consideration. The objections are, that the son parted with an estate tail; taking back only an estate for life; and that the father took the ultimate remainder in fee, and the sum of 3000*l*. With respect to the former objection, the reduction of the estate tail of the son to an estate for life has always received the favor and encouragement of this Court: *Winnington v. Foley* (6). The reason there stated is, that it is the means of preserving the estate longer in the family. This was confirmed in *Mansell v. Mansell* (7). Then, as to the remainder in fee: the father had a title to that remainder in fee by descent. With respect to that therefore he parted with nothing, and got nothing. As to the 3000*l*. that part of the transaction is rather a proof, that the son perfectly understood what he was doing. As to that he could not be imposed upon. He must have been aware, when consenting, that his father should take that for his own benefit, that he was doing that, which he was not absolutely compelled to do. It proves the good sense of the son rather than any fraud in the father. He knew, the creditors might get possession of the estate during the father's life. It was wise therefore in him to permit a charge by way of mortgage rather than let them get possession. He had a right to limit the estate, as he pleased, as tenant in tail; and a deed from its solemnity imports a consideration (8); as observed by Mr. Justice Wilmot in *Pillans v. Van Mierop* (9). This deed was made thirty years ago. The son does not now complain of it. He confirmed it at the age of thirty-five by the purchase from More.

It is said, in order to avoid the difficulty upon the Statute 13th Elizabeth, that the Plaintiffs are not creditors merely, but * purchasers. If they are to be considered purchasers, [* 869] yet as purchasers under a trust for payment of debts they are to be considered with great jealousy; for such debts are obtained from men under a sort of duress. They are also to be considered as purchasers under articles. They could not support an ejectment.

(1) Toth. 104.

(2) 3 Ch. Rep. 262.

(3) 1 Vern. 181.

(4) 2 Vern. 303.

(5) 1 P. Wms. 358.

(6) 1 P. Wms. 536.

(7) 2 P. Wms. 678; see page 683.

(8) See Mr. Fonblanque's note, 1 Treat. Eq. 335.

(9) 3 Bur. 1663.

Bisco v. The Earl of Banbury (1). When a purchaser wants relief in this Court, notice is the cardinal point of the transaction; and the rule laid down by Lord Talbot in *Collet v. De Gols and Ward* (2) applies. The Court will take into consideration the comparative equity of the parties.

The cases upon the Statute 27th Elizabeth are very irreconcilable. *Gooch's Case* (3) was upon a fraudulent conveyance. As to a mere voluntary conveyance great men have differed. The first case is *St. Saviour's Case* (4); that a voluntary conveyance is void *prima facie*, not absolutely. A case cited in *Lord Teynham v. Mullins* (5) is to the same effect; that a deed may be voluntary, and yet not fraudulent. That is also the result of *Alford v. Alford* and other cases: but there is only one, *White v. Hussey* (6), in which such a conveyance was held void, as fraudulent, without referring it to a jury. The other cases proceed upon the principle, that as the statute only declares fraudulent conveyances void, voluntary settlements are entitled to great privileges. In *Jenkins v. Keymis* (7), relied on principally by Lord Hardwicke in subsequent cases, it was held, that the limitation, though not supported by valuable consideration, was not fraudulent; for there was a fair and honest reason for such a settlement. That doctrine is supported in *Ithell v. Beane* (8) and *Newstead v. Searles* (9); and in *Russell v. Hammond* (10) Lord Hardwicke takes pains to show, it is only evidence of fraud. Subsequent cases have leaned against that. In *Colman v. Sarrell* (11) Lord Thurlow held, that to raise a trust a meritorious consideration is sufficient. This doctrine was extended to a great degree, perfectly sufficient to support the present settlement, in *Myddleton v. Lord Kenyon* (12); that if the co-operation of each party was necessary for the purpose of making the deed, it is perfectly sufficient. The policy of the statute 27th Elizabeth is the same as that of the 13th Elizabeth; to prevent mischief. The distinction is upon the *bona fides* of the consideration; for [*870] * a conveyance fraudulent under those statutes may be upon a good and meritorious consideration (13). It is said, that Lord Mansfield's opinion in *Doe v. Routledge* was without sufficient ground. Lord Mansfield does not there say, that a voluntary conveyance is void or good: he distinguishes between a fraud-

(1) 1 Ch. Ca. 287.

(2) For. 65.

(3) 5 Co. 60.

(4) Lane, 21.

(5) 1 Mod. 119.

(6) Prec. Ch. 13.

(7) 1 Lev. 150, 237.

(8) 1 Ves. 215.

(9) 1 Atk. 265.

(10) 1 Atk. 13.

(11) 3 Bro. C. C. 12; *ante*, vol. i. 50.

(12) *Ante*, vol. ii. 391.

(13) That even valuable consideration will not avail, unless it is also *bona fide*, see *Troyn's Case*, 3 Co. 80, and *Doe v. Routledge*, Cowp. 705.

ulent conveyance and a voluntary family settlement. The term "voluntary" admits of nice shades of difference between the points, where the parties have no mutual interest, and, where both execute for the purpose of a family settlement, Lord Mansfield says as to the latter, notice varies it much; and compares it to the cases upon the Registry Act (1). This is confessedly a voluntary family settlement; and they have notice. *Myddleton v. Lord Kenyon* is still stronger. The Lord Chancellor there held, that the slightest consideration is sufficient to support a voluntary family settlement; and *Roe on the demise of Hamerton v. Mitton* (2), there (3) referred to by the Lord Chancellor, is an authority for the same purpose; and it was the ground, upon which the Lord Chancellor proceeded. Lord Chief Justice Wilmot there says, the statute 27th Elizabeth was made, only against covinous and fraudulent conveyances.

It has been repeatedly held, that a subsequent valuable consideration will support a prior voluntary, or even a fraudulent, settlement, by reference. This is as old as the statute of Marlebridge (4). In *Prodgers v. Langham* (5) it was upon that doctrine held, that, where a feoffment was made without good consideration, or even by fraud, and that feoffee enfeoffs another for valuable consideration, and then the original feoffor enters; and makes a feoffment for valuable consideration, yet the former will prevail by the effect of the reference. This has been carried to the extent, that a subsequent good deed is sufficient to support a prior voluntary settlement; or, that a subsequent marriage would have that effect. *Kirk v. Clark* (6); *East India Company v. Clavel* (7). But those cases are not so strong; for the party was induced to marry upon the settlement; and had full notice of it. That does not appear either in *Prodgers v. Langham* or this case: *but [*871] where a woman marries a man, who has a notorious title under such a deed, she shall be considered as having purchased; and her title under that deed is fixed by the accession of her own meritorious claim: and therefore the subsequent marriage of William Gapper in this case supports the prior voluntary settlement.

The cases cited for the Plaintiffs are either inapplicable, or inefficient to this purpose. *Grant v. Edes* proves only, that the father, the son, and the trustee, have a right to join in resettling the property. *Girling v. Lowther* militates entirely against *Townshend v. Lawton* (8) and other cases. *Davies v. Weld* was never decided: nor is it entirely applicable; for the estate was special tail; and it is said (9) in *Mansell v. Mansell*, that where the husband and wife

(1) 20 Ann. c. 7. See *Jolland v. Stainbridge*, ante, vol. iii. 478.

(2) 2 Wils. 356.

(3) Ante, vol. ii. 410. See Mr. Sanders's note, 3 Atk. 188, to *Goring v. Nash*.

(4) 52 Hen. III. c. 6. See Lord Coke's comment, 2 Inst. 111.

(5) 1 Sid. 133. See post, vol. ix. 195.

(6) Pr. Ch. 275.

(7) Pr. Ch. 377.

(8) 2 P. Wms. 379.

(9) 2 P. Wms. 685.

were much in years, had no prospect of issue, and the estate in debt, the Courts may perhaps formerly have gone so far as to decree trustees to join in a sale; which however, it is added, was going too far. *Platt v. Sprigg* is clearly inapplicable: the settlement being, only of an Equity of redemption, the mortgagee was not bound, but might enter or foreclose; and the husband and wife not being able to redeem, a sale was absolutely necessary; and it is said (1) in *Mansell v. Mansell*, that the mortgagee threatened to enter. In *Barnard v. Large* (2) that is referred to by the Master of the Rolls as a case of extreme necessity. In *Basset v. Clapham* it does not appear, that the settlement was set aside under the statute of Elizabeth. The bill is stated to have been filed by creditors, not purchasers. It was therefore considered in the light of a fraudulent settlement. That case is probably inaccurately reported. In several other cases referred to by Mr. Cox (3) it is not mentioned; and the course of the Court is directly against it: the principle being, that a trustee may join in destroying contingent remainders in any settlement; provided it is for the purpose of resettling, to preserve the estate in the family; and the Court will for that purpose compel him to join: but where he joins for the purpose of alienating, for paying debts, &c., it is a breach of trust; and there is no difference, whether it is a voluntary settlement, or for valuable consideration, or by will.

[* 872] * This is for the express purpose of alienating the property; giving it up to creditors; and defeating the rights of those ultimately to be benefited, if ever they come into existence. The articles of separation do not signify. Besides, the wife may die; and he may marry again. Lastly, if the opinion of the Court should be against this settlement, yet there can be no decree upon this bill; which does not charge fraud. In that respect it is within the Lord Chancellor's observation (4) in *Myddleton v. Lord Kenyon*; that a declaration, that the deed ought to be set aside for fraud would be inapplicable to the frame of the bill, and without any thing to warrant it upon the record.

Mr. *Richards*, in reply. The separation, I admit, is properly put out of the case. The question therefore really is, whether this settlement is or is not good against these Plaintiffs. I cannot concur in attributing any merit to the settlement, any thing praiseworthy to the conduct of the father, or any particular attention to the situation of his son. He calls upon the young man a month after his attaining twenty-one to abridge his interest to a bare tenancy for life, and to charge 3000*l.* for his father. The son being tenant in tail in remainder might have levied a fine, and acquired a base fee against his own issue in the life of the father; and have carried it to market. He had an interest considerably larger than the estate for life he took

(1) 2 P. Wms. 685.

(2) 1 Bro. C. C. 536.

(3) In the note, 2 P. Wms. 358.

(4) *Ante*, vol. ii. 402.

under this deed. How can it be said to be an act of prudence in him? The father remained, as he was before; but reduced his son. I do not complain, that the father took the ultimate fee to himself; for he had that interest before: but I complain, that he accelerated his fee by abridging the rights of his son, who takes a less interest than he had before; and the ultimate remainder of the father is brought nearer. The father's interest is exclusively attended to. Family settlements ought always to be prepared with due attention to the real interests of the father: but in this instance the father dealing with this very young man barely twenty-one, takes great advantage to himself; and gives nothing but disadvantage to his son. Beyond all doubt the settlement is voluntary. Nothing moved to the son as a consideration; and this advantage is taken of his inexperience, when barely of an age to put his hand to the deed. At best it is only voluntary; *and if not to be called [*873] fraudulent, it flowed from the exercise of some sort of undue influence over the young man's mind.

That family settlements have been established, where there was any thing like a consideration, is perfectly agreed: but there is no case of that sort, where, not only there was no consideration, but the young man was imposed upon. *Myddleton v. Lord Kenyon* is wholly dissimilar. There the father complained. In *Kinchant v. Kinchant* the father paid a great many of the son's debts; and it was a very deliberate transaction. Lord Kenyon however, then at the Bar, was much dissatisfied with the judgment of Mr. Justice Gould. The dispute was purely between the father and son. The transaction was conducted with every possible deliberation and fairness: instructions being taken by a very capable attorney. Mr. Justice Gould laid great stress upon the propriety of the settlement; giving the sisters a provision. All that was stated upon the settlement. This is nothing but a pure naked settlement; taking from the son and giving to the father these advantages. The dates show, that the father could not have paid debts for his son, as in that case; unless the Court infers, that he paid debts contracted during the minority. It is impossible therefore, if this had been discussed in due time, that this could have been considered a good settlement between a father and a son. I admit a settlement voluntary, or even fraudulent, may be made good by a subsequent act. But there is nothing of that sort in this case; unless the marriage is applicable. The transaction with More does not bear upon it; and cannot operate as a confirmation of the settlement of 1769. There was no act or acquiescence binding the son to sanction it. The father lived until 1793. That must never be forgot. The son had not during his life the means of disputing it. It is true, he married; but not upon the faith of this deed. There was no inducement to marry him from this settlement, or from his being tenant for life, &c.; and the power of providing for his wife and children was very much reduced. No settlement was made upon his marriage. The father of Mrs. Gapper gave her nothing upon her marriage: but upon the separation all her fortune,

which is considerable, was settled. The case of *Prodgers v. Langham* is very different. The daughter, in possession of the lease and the leasehold property, marries, believing herself entitled to it.

[*874] * Then the question is, whether, admitting the Plaintiffs are purchasers for valuable consideration, they are entitled under the statute 27th Elizabeth. I am aware, how Lord Mansfield qualified his opinion upon voluntary settlements: yet that was not acted upon. Notice, I admit, though it makes no difference, if the deed is void at law, is material in equity (1); and in that case the Court would lay hold of any circumstance. Many of the cases cited apply to a voluntary settlement in a family; which is undoubtedly good as among them. *Myddleton v. Lord Kenyon* was a question between the family: the father who made the settlement, filing the bill to set it aside. *Kinchant v. Kinchant* is a case of the same description. If the settlement is fair, the Court will never set it aside as between the parties. *Prodgers v. Langham* proves the proposition. The settlement was established on account of the marriage: but in the same case it is said, a voluntary conveyance would be void as against a purchaser for valuable consideration, as being merely voluntary. The question in this Court is always, whether it is voluntary or not. The decisions from *Twyne's Case* (2) to this time, *Newstead v. Searles* and all the others, though many Judges have expressed some disapprobation, have been uniform, that a voluntary conveyance is void against a purchaser for valuable consideration, and covin or fraud are not required in order to set it aside. There is not one case deciding, that such a purchaser has not a right under the statute so to consider it. They all state, that as against him the single circumstance, that it is voluntary, is a badge of fraud. *Basset v. Clapham* is in point. There the trustee was called upon: but it makes no difference, that the bill is filed by the trustees, if they cannot execute the trust, as they cannot in this instance, without the aid of the Court. The objection from articles does not arise. This is not in articles. The conveyance is made. The subject is gone. The Plaintiffs come here having an estate conveyed to them, calling on the Court to assist them in the execution of their trust, which they cannot execute at law or without the aid of this Court. The principle and the rights of the parties are precisely the same as in *Basset v. Clapham*. *Davies v. Weld* was not cited for the purpose of showing a decision; but that at that time the Court were in the habit of considering this sort of case as feasible. I admit, that

[*875] would not do now: but at that time it * was not considered so absurd to attempt to set aside a settlement, where there was such great improbability of marriage. This settlement, if impeached soon after it was made, could not have stood an hour. It is contaminated, I will not say by fraud, but by undue influence;

(1) See the note, *post*, vol. xviii. 88, *Pulvertoft v. Pulvertoft*.

(2) 3 Co. 80.

so that it could not have stood against the son ; and there is no act or acquiescence by him to confirm it. From 1793 it is impossible to consider his not stirring as an acquiescence. The case is now therefore to be considered in the same light, as if this had happened soon after the execution of the settlement ; when the son or any person claiming under him might have set it aside. The Plaintiffs at least stand in his place : but under *Basset v. Clapham* they are entitled as purchasers for valuable consideration to consider this settlement void : and to be enabled to execute their trust.

March 24th. The MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This is a very curious case : but the ground, upon which I shall decide it, will not make it necessary for me to enter into all the learning, that was displayed in the argument. It was extremely well argued on both sides. I mean to say, I feel myself extremely obliged to Mr. Heald ; who undertook the task at my desire and earnest recommendation. He was set up here to defend the rights of persons, who might possibly come *in esse*. Feeling it his duty, standing for the trustee, to contend as if those persons were real parties before the Court, he has certainly done them ample justice ; and I believe, I have every information I could receive ; and the cause could not have been better argued ; but the decree will be made upon a much narrower ground ; and it will not be necessary to enter into the consideration of the statutes 13th and 27th Elizabeth.

The bill is brought to set aside a settlement executed under an agreement between a father and a son in 1769. This transaction then took place. Robert Gapper, the father, was then seised for life ; with remainder to his first and other sons in tail male, and the reversion in fee in himself as heir of his father. Under these circumstances William Gapper, the eldest son, was prevailed on, as it is said, improperly, and perhaps so, very soon after he came of age to reduce himself to be tenant for life, and to raise 3000*l.* for the benefit of his father ; as it appears. It is said, this standing *by itself was such an exercise of parental au- [*876] thority as this Court will not endure ; that a son shall assist his father with such a sum, and without any cause or consideration reduce himself to be tenant for life. I am not clear, that, stating it in that way, if a complaint had been made immediately to the Court, and the father was alive to state the real transaction, the Court would not relieve : but I do not choose to give an opinion even upon that. The consequence was, a recovery was suffered ; and the effect was that I have stated. But there has intervened a material transaction ; which upon the argument and the cases quoted has put an end to the equity of the son to set this aside at this distance of time and under these circumstances. The son acquiesces under this settlement ; and marries. It is said, there was no settlement upon his marriage ; and there is no evidence, that this entered into the consideration of the lady. She is still living : but it is said,

there is no probability of children. They live at a distance from each other ; having been long separated. It is however admitted, I cannot act upon that ; but must suppose a possibility of children. The law cannot be altered by my opinion as to the probability of that event. The question then is, whether the children, supposing there may be children, have a right to be protected against the right of the son to set this aside. The father died in 1793. No attempt had been made to that time to affect the settlement either at law or in equity. But after that time, after the father's death, I will suppose very soon afterwards, this bill is filed ; praying the Court to interfere, and compel the trustee to preserve the contingent remainders, for he is the only person I can act upon, to convey to the uses of the deed, by which William Gapper becoming extremely encumbered conveyed to trustees, upon trust to sell for the payment of his creditors in general ; for it is not a particular purchase for valuable consideration ; except as such a deed for the payment of creditors generally can be so considered. But this is in a Court of Equity. They do not insist, that all this is void at law. I will give them liberty to make out at law, that this deed was fraudulent and void under the statute. But they come here upon a mixed case ; that it is either absolutely void under the statute, or a stretch of parental authority, which this Court will not suffer to operate against the son. Suppose the bill brought upon the latter ground ; that must ever be without affecting the rights of others ; for if the son has done any [* 877] act, by which others acquire rights * upon the supposition, that his right is according to the deed, it is not competent to him to come upon circumstances, not arising out of it, to set it aside.

Another rule affecting this case is, that the application should be made in such time, that the transaction can be known and sifted to the bottom. It is said, the decision in *Kinchant v. Kinchant* did not meet the approbation of a noble lord ; and I confess, I think, with some reason. I admit, it is very different from this case ; for it does not appear, that there was any thing here, that the son could gain : but I do not choose to lay it down, that under any circumstances such a transaction can be set aside. I do not know, what debts the father might have paid for this young man. I cannot tell under these circumstances, how much of this sum of 3000*l.* might have been applied for the son. I should make wild work in letting the son come and complain at any distance of time. What was there unreasonable in tying himself up to an estate for life, and leaving it to his children ? Perhaps under these circumstances it would be better for him. But, though transactions of this kind will be looked at with jealousy, that the father should not take an improper advantage of his authority, the complaint must always be made in time ; not after the father is dead, and the son has entered into an act, by his marriage, under which immediately, the moment it is celebrated, persons unborn acquire a right.

The case of *Prodders v. Langham* was relied on to show, that cir-

cumstances *ex post facto* may make good a settlement, that might have been impeached (a). The meaning of it is, that though the estate does not appear to have been settled on the marriage, it may be intended to be an inducement to consent to the marriage; and then the father shall not afterwards set up a subsequent conveyance for valuable consideration; to put an end to that conveyance, upon the faith of which that marriage was contracted. *Kirth v. Clark* (1). *Roe on the demise of Hamerton v. Mitton*, a case at law, proceeds pretty much upon the same ground. Observe the argument of Chief Justice Wilmot. The mother had given up nothing; for she only changed her annuity from the whole to a part of the estate. How they wanted the assistance of the mother, what good it did, I cannot see. The Chief Justice states the objection thus:

* "But it was objected, that John was seised, and could [* 878] have made the settlement without the mother; and that in truth no real or good consideration moved from her at all; for that she still had her annuity charged upon part of the lands: in answer to this the applying to the mother shows, that John Hamerton could not have made a settlement agreeable to the lady's friends without the mother."

That I do not see at all.

The Chief Justice adds, that any consideration given by the mother would have made her a purchaser for her younger sons; and by the limitation to the daughters of the marriage after that to the two brothers of John Hamerton, it was as plain, the mother intended her sons should be preferred, as if she had said, she would not change her security from the whole to a part of the lands, unless he would do that.

Observe, what sort of consideration this apparent consideration moving from her is; and, whether the principle must not be, that those concerned in it had in contemplation this remainder to the other sons; and that was sufficient to protect it.

Kirk v. Clark is an extremely strong case. Parol evidence was given of some discourse as to this settlement: but that I do not think makes much difference, for it is not to be supposed, the parties are ignorant of the circumstances of the person going to marry. The father had settled the reversion of the copyhold estate upon the son, for the purpose of lessening the fine to be paid. The parol evidence was, that afterwards upon the treaty for the son's marriage the friends of the lady proposed to have the copyhold estate settled with a leasehold estate; stating, that they relied chiefly upon the copyhold as an equivalent for her fortune; upon which the father

(a) 3 Sugden, Vend. & Purch. (6th Am. ed.) 208, 209, [297], [298]; *Jackson v. Henry*, 10 John. 185, 187; *Fletcher v. Peck*, 6 Cranch, 133; *Bumpas v. Platner*, 1 Johns. Ch. 213, 219; *Roberts v. Anderson*, 3 Johns. Ch. 377; *Oriental Bank v. Haskins*, 3 Metcalf, 332; *Bean v. Smith*, 2 Mason, 252; *Doe v. Howland*, 8 Cowen, 277; *Seward v. Jackson*, ib. 406; *Wood v. Jackson*, 8 Wendell, 16; *Murray v. Riggs*, 15 John. 571.

(1) Pre. Ch. 275.

said, he had settled that already upon his son. But it is very extraordinary, that it made no part of the articles, independent of that evidence.

Am I to be told, when a man having an estate settled upon him and his sons in strict settlement by an unimpeached deed, has married, am I to say, after that, this was a voluntary conveyance; and therefore he is tenant in tail: and the issue of the marriage are not to have any interest? I say, that is a fraud; and a per-
[* 879] son *going to treat, and holding himself out so, is guilty of fraud. The answer is, the wife and the issue of the marriage are purchasers (a); and he must be considered seised according to that deed. It does not appear here, that it was regarded as the principal inducement; but it might be so. The lady had a right, the children have a right, to have it considered, that he had the estate, which he appeared to have; and I should do gross injustice in taking away that benefit. Therefore I am of opinion, though it does not appear, that the friends of the wife did speculate upon this, and take it into consideration, it must be presumed, they did act upon it; and the husband has not a right now to disturb it. Upon the principles of these cases, no notice being taken of this before, and there being great doubt, whether a Court of Equity would interfere, unless gross injustice appears, I must hold it impossible, unless the son makes his complaint in reasonable time; when the circumstances can be known, and these family transactions can be unravell'd. If I see a father taking away the estate from his son without consideration by the influence of his authority, that is a strong case (b): but here it is impossible for me to know, how he maintained the son; or, whether any of this money was applied for him. There is no one to sustain the question. The issue of the marriage stand in a more favorable light than the other persons in remainder over.

Upon the whole this is not a case, in which the Court can compel the trustee to act, or any thing to be done; unless the Plaintiffs can

(a) Marriage is not only a *bona fide* and valuable consideration, but the very highest consideration in law. *Tunno v. Trevezant*, 2 Desaus. 264; *Whelan v. Whelan*, 3 Cowen, 538, 579; *Sterry v. Arden*, 12 John. 536; S. C. 1 Johns. Ch. 261; *Magniac v. Thompson*, 7 Peters, 348; S. C. Baldwin, C. C. 358.

(b) As to the undue influence of parental authority, see *Blackborne v. Edgley*, 1 P. Wms. 600; *Blunden v. Barker*, ib. 634; *Morris v. Burroughs*, 1 Atk. 496; *Cocking v. Pratt*, 1 Ves. 401; *Tendrill v. Smith*, 2 Atk. 85; *Heron v. Heron*, ib. 160; *Young v. Peachy*, ib. 254; *Carpenter v. Heriot*, 1 Eden, 338; 1 Story, Eq. Jur. § 309; *Jenkins v. Pye*, 12 Peters, 241; *Myddleton v. Lord Kenyon*, ante, 2 V. 391, note (b).

He who bargains in a matter of advantage with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence. *Whelan v. Whelan*, 3 Cowen, 538.

In family agreements the Court has administered an equity, which is not usually applied to agreements, even where some degree of authority has been exercised by a parent, or where the party might have been under a misapprehension of his rights. *Cory v. Cory*, 1 Ves. 19; *Slapilton v. Slapilton*, 1 Atk. 2; *Cann v. Cann*, 1 P. Wms. 723; *Pullen v. Ready*, 2 Atk. 587; *Wycherley v. Wycherley*, 2 Eden, 175; *Stockley v. Stockley*, 1 Ves. & Bea. 23; *Dumngage v. White*, 1 Swanst. Ch. 137.

set it aside at law. Therefore without determining, whether this is a void settlement at law, I cannot give the relief prayed. The ground I go upon, without entering into the question, how far relief could be given, if all the circumstances were brought before the Court recently and during the father's life (a) is, that after a marriage, by which the first and other sons were entitled to legal estates, protected by trustees to preserve contingent remainders, I cannot upon this bill, in the absence of persons who may claim, indeed, before their birth, interfere to have the legal estate taken out of them (b).

The bill therefore must be dismissed (1).

1. THAT other considerations, besides mere pecuniary ones, are to be taken into account, in order to estimate, properly, the reasonableness of family arrangements; see, *ante*, note 2 to *Myddleton v. Lord Kenyon*, 2 V. 391.

2. A settlement, liable to impeachment, at the time it was made, may, (as was said in the principal case,) be sustained by a consideration arising *ex post facto*; but that is only in instances where a valuable consideration was all that was wanting to have made the transaction good *ab initio*; *George v. Milbanke*, 9 Ves. 192; where there was any thing fraudulent in the original concoction of a bargain, subsequent payment of money cannot make the transaction cease to be fraudulent, though it may cease to be voluntary. *Daubeny v. Cockburn*, 1 Meriv. 626; *Cadogan v. Kennell*, Cowp. 434.

3. The doctrine of the principal case, that marriage is a consideration by virtue of which the wife and issue of the marriage are to be held purchasers, is well established, as to all cases where there has been a settlement, or an agreement for a settlement before marriage; see *Pyke v. Pyke*, 1 Ves. Sen. 377; *Ramsden v. Hilton*, 2 Ves. Sen. 309; *Parkes v. White*, 11 Ves. 235; *Stratford v. Powell*, 1 Ball & Bea. 25; *Harvey v. Ashley*, 3 Atk. 610; and that Courts of Equity are always disposed to construe agreements or proposals, on the faith of which marriage has taken place, liberally in support of the interests of claimants under such agreement, and to enforce the execution thereof; see the note to *Luders v. Anstey*, 4 V. 501.

(a) As to the unwillingness of Courts of Equity to entertain stale demands, see note (b), to *Moth v. Atwood*, *ante*, 845, and cases cited.

(b) If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed, though void in its creation as to purchasers, will on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made on a valuable consideration. See 3 Sugden, Vend. & Purch. (6th Am. ed.) 209, [298], and cases cited; *Sterry v. Arden*, 1 Johns. Ch. 261, 271, 272; S. C. 12 John. 536; *Huston v. Coutril*, 11 Leigh, 136; 4 Kent, (5th ed.) 463.

And it makes no difference whether any particular marriage was in contemplation or not, at the time of the voluntary settlement. *Sterry v. Arden*, *ubi supra*. See also *Argenbright v. Campbell*, 3 Hen. & Munf. 144. See 1 Story, Eq. Jur. § 434; *Magniac v. Thompson*, 7 Peters, 348; S. C. Baldwin, C. C. 358.

(1) *Tweedell v. Tweedell*, 1 Turn. 1.

IN the Vacation, on the 14th of April, Lord LOUGHBOROUGH, afterwards created Earl of ROSSLYN, resigned the Great Seal ; which was immediately delivered by his Majesty to Lord ELDON, Chief Justice of the Court of Common Pleas, as Lord High Chancellor of Great Britain. His Lordship continued to preside in the Court of Common Pleas until the appointment of his successor Lord ALVANLEY ; which took place after Easter Term. On the 15th of April, the Lord Chancellor held the First General Seal before the Term.

Sir JOHN MITFORD, His Majesty's Attorney General, resigned his office ; and was elected Speaker of the House of Commons.

Sir WILLIAM GRANT, His Majesty's Solicitor General, at the same time resigned that office ; and after Easter Term succeeded Lord ALVANLEY, as Master of the Rolls.

EDWARD LAW, Esq. one of His Majesty's Counsel, was appointed Attorney General ; and received the honor of knighthood.

The Honorable SPENCER PERCEVAL was appointed Solicitor General.

IN Hilary Term, WILLIAM MACKWORTH PRAED, Esq. was called to the degree of Serjeant at Law.

TABLE OF CONTENTS.

<p style="text-align: center;">A</p> <p>ABATEMENT. See Bankrupt, 15. Practice, 14, 15.</p> <p>ABRIDGMENT.—See Copyright 2.</p> <p>ACCEPTOR FOR THE HONOR OF DRAWER.—See Bankrupt, 8.</p> <p>ACCOUNT.</p> <ol style="list-style-type: none"> 1. Admission of Assets prevents the necessity of setting forth the accounts. <i>Pullen v. Smith</i> 21 2. A strong ground necessary to set aside settled accounts; or error, to surcharge and falsify. 837 <p style="padding-left: 40px;">See Chancery. Fraud 1. Mortgage, 4. Pleading, 2, Presumption, 2. Principal and Agent, 1, 4.</p> <p>ACT OF INSOLVENCY. See Insolvent Act.</p> <p>ADMINISTRATION.—See Will, 21.</p> <p>ADMINISTRATOR. See Representatives.</p> <p>ADVANCEMENT. Money laid out by the intestate on repairs of houses, which descended to his eldest son, as heir, is not an advancement, to be brought into hotchpot under the statute: otherwise, if the houses had been given to the</p>	<p>ADVANCEMENT—<i>continued.</i> son in the father's life. <i>Smith v. Smith.</i> 721</p> <p>ADVOWSON. The statute 7 Ann, c. 18, enacting, that the interest of the patron of an advowson shall not be displaced by usurpation, is not retrospective. 828</p> <p>AFFIDAVIT. See Evidence. <i>Ne exeat Regno.</i> Agent.—See Lien. Mortgage, 4. Principal and agent.</p> <p>AGREEMENT.</p> <ol style="list-style-type: none"> 1. Construction of an inaccurate letter, the basis of a settlement. <i>Luders v. Anstey.</i> 213 2. Bill for specific performance of an agreement dismissed: the agreement appearing from letters produced to have been different from that set up by the bill and proved by one witness. <i>Leph v. Haverfield</i> 452 3. Objections by a purchaser by auction, 1st, That a way round and across a meadow was not specified; 2dly, on account of a bidding for the Plaintiff: a specific performance was decreed with costs. <i>Bowles v. Round.</i> 508 4. A vendor cannot come at any distance of time for a performance: but upon a bill filed four-
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AGREEMENT—continued.

- teen months after the correspondence upon the objections to the title ceased by the Defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the Master. *The Marquis of Hertford v. Boore.* 719
5. The time for performance of a contract is material. 736
6. Specific performance refused on account of the laches of the Plaintiff, the vendor. *Guest v. Homfray.* 818
7. A small incumbrance, which may be the subject of compensation, no objection to a specific performance. *Ib.*
8. Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet upon such an agreement, where some of the parties to be bound were married women, of whom also one had not executed, the Court refused a specific performance; and dismissed the bill; leaving the Plaintiff to law. *Emery v. Wase.* 846
9. Specific performance not of right, but in the discretion of the Court. *Omerod v. Hardman.* 734
- See Deed. Dower, 2. Evidence. Partition. Practice, 29. Purchaser, 3, 4. Will, 40.

ANNUITY.

1. The Annuity Act with respect to annuities subsisting at that time, only restrains the action, till its provisions are complied with; not limiting the time: and does not, as in the case of subsequent annuities, make the security void. In the former case therefore the bond being

ANNUITY—continued.

- by accident lost, the annuitant was admitted a creditor for the arrears of the annuity, the real debt in equity. *Toulmin v. Price.* 235
2. No execution for the penalty of a bond securing an annuity; but only *toties quoties* for the accruing payments. 239
3. Arrears of an annuity secured by bond not allowed beyond the penalty in the administration of assets. *Mackworth v. Thomas.* 329
4. An annuity secured by a bond and a term for years being void, the memorial not taking notice of the term, and the clause of redemption, and stating the payment of the consideration in money, though it was paid by draft, a general account was decreed of the consideration with interest and costs, and of all money received under the annuity: the balance to be paid to the Defendant, if any; the securities delivered up; and a conveyance. *Byne v. Vivian.* 604
5. Where an annuity is set aside, and an action brought for the money, an account is always taken of all money received under the annuity. 608
6. Bill to set aside an annuity, secured by a term for years and a bond, upon objections to the memorial for not containing a clause of redemption, for not stating the consideration truly, and other defects. The Defendant admitting he had received more than was due to him for principal and interest, the securities were decreed to be delivered up to be cancelled, with costs. *Byne v. Potter.* 609
7. Annuity void, the memorial not containing the clause of redemption, not stating the consideration truly, and being

ANNUITY—continued.

otherwise defective, was set aside by the decree: but the Plaintiff having failed in two applications to the Court of King's Bench upon some of the objections, and having in the interval been a party to the assignment to the Defendant, the account was confined to the filing of the bill. The Defendant was held entitled to the original consideration, though exceeding the sum paid on the assignment. *Bromley v. Holland.* 610

8. The refusal of a summary application to set aside an annuity is no objection to the same ground being taken again upon an attempt to enforce it. 617

9. An annuity being void, the memorial not containing a clause of re-purchase, the grantee was not allowed in the account the premiums of insurance of the life of the grantor and costs incurred in supporting the annuity. *Ex parte Shaw.* 620

10. Annuity secured by bond and a trust of rents and dividends being void, the memorial omitting a clause of redemption, and the trust, and stating the consideration untruly, a general account was decreed of the purchase-money from the actual payment, which was subsequent to the date of the deeds, and of the premiums paid by the grantee for insuring the grantor's life, and an account of all sums received under the annuity; with interest respectively: on payment of the balance and the costs by the Plaintiff the securities to be delivered up, &c.: the bill offering to pay principal and interest and any other fair and reasonable demands. A letter from the grantor, written prior to the grant in the course of another negotiation between the parties, which did not take

ANNUITY—continued.

place, was admitted in evidence, but no farther than that he had upon that occasion proposed the insurance of his life as a reasonable term. *Hoffman v. Cooke.* 623

See Bankrupt, 14.

ANSWER.

See Assignment. Evidence, 2. Practice, 5. Tithes, 1, 2.

APPEAL TO THE HOUSE OF LORDS.

See pages 71, 164, 266, 508 Practice, 15.

APPOINTMENT.

See Evidence, 3. Implication, 1. Power. Promotions. Will, 4, 5.

APPROPRIATION.—See Will, 6.**ARBITRATION.**

Award not to be set aside, because the arbitrator made use of the judgment of another person. 848

See Agreement, 8.

ARREARS OF ANNUITY.

See Annuity. Purchaser, 6.

ARTICLES.

1. Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed. 275

2. Articles of marriage to settle estates of the husband and wife of equal value in strict settlement, and providing portions: the wife's estate being withdrawn by decree on the ground of infancy, the younger children were confined, as against the eldest, to half the portion: the articles providing in the event of no issue male, in which case the estates were to separate, that each should bear a moiety: though they also contemplated the case of the wife's refusal to be bound; providing against it by the forfeiture of her interest. *Clough v. Clough.* 710

See Construction, 2. Settlement, 1, 2.

ASSETS.

The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, and the real estate being devised, the Court would not under a direction to the executors to pay the debts and funeral expenses, as soon as conveniently may be, marshal the assets in favor of the legatees. *Keeling v. Brown.* 359
See Will, 25.

ASSIGNEE.

See Bankrupt. Mortgage, 4.

ASSIGNMENT OF EQUITABLE INTEREST.

The Court has perhaps gone too far in permitting assignments of rights in accounts to be taken. Such a right cannot be parcelled out; so that every person may file a bill. 589

See Insolvent Act.

ATTORNEY.

See Bankrupt, 12. Mortgage, 4.

AUCTION.—See Agreement, 3.**AUTHOR.**—See Copyright.**AWARD.**

See Agreement, 8. Arbitration.

B**BAIL.**—See *Ne exeat Regno*, 5.**BAILIFF OF THE CITY OF LONDON.**

See Jurisdiction, 6.

BANK OF ENGLAND.

The Bank of England are not to look beyond the legal title, to the trusts of the will; and therefore cannot prevent the executor from selling out or transferring stock into his own name. *The Bank of England v. Parsons.* 665

BANKRUPT.

1. General Order, that in a Country Commission two Barristers resident near the place be inserted in the list of Commis-

BANKRUPT—continued.

sioners; and no *Quorum* Commissioner, unless a Barrister. 578

2. A separate commission of bankruptcy established, though the other partner died before the assignment. *Ex parte Smith.* 295

3. The Lord Chancellor has no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting on his security, to join in a sale obtained by a prior mortgagee under the General Order, 8th May 1794, not producing enough for both mortgages. *Ex parte Jackson.* 357

4. A partnership cannot be established by the evidence of the partners and their private communications. The fact must be proved *aliunde*. For want of such proof a commission against the ostensible partners was sustained. *Ex parte Benfield.* 424

5. A bill indorsed by the drawer as a farther security on discounting another bill for him: the drawer and acceptor of the bill so indorsed becoming bankrupts, the proof against the estate of the acceptor, not the dividend only, was restrained to the original debt.* *Ex parte Bloxham.* 448

6. A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt; and may therefore follow the real assets or their specific produce in the hands of the assignees. The subject being small, relief was given on petition. *Ex parte Morton.* 449

7. Assignees of a bankrupt claiming property in right of his wife

* This point being brought on afterwards before Lord Eldon, Chancellor, this decision was over-ruled. *Ex parte Bloxham*, 11th August, 1801. 27th January, 1802. *Post*, vol. vi. 449, 600.

BANKRUPT—continued.

must make provision for her.
Lumb v. Milnes. 517

8. Acceptor for the honor of the drawer of a bill originally accepted by the bankrupts, having taken up the bill, ought, if the bankrupts had no effects in their hands, to resort first to the drawer. Therefore though his proof was permitted to stand, the dividend was restrained for an inquiry, whether the bankrupts had effects, and if not, whether the person, who so took up the bill, had effects of the drawer at the time or since. *Ex parte Wackerbath.** 574
9. Upon a separate commission of bankruptcy the benefit of an insurance effected by the bankrupt upon his own account on a ship, of which he was joint owner, is not liable to the joint creditors.† *Ex parte Parry.* 575
10. A commission of bankruptcy on residence abroad, where the departure from the realm was for a fair and proper purpose, and not with a view of defrauding creditors, the trade continued by a partner, and the petitioning creditor's debt subsequent, superseded. *Ex parte Mutrie.* 576
11. A bankrupt cannot file a bill of redemption in respect to his right to the surplus; but when he has a clear interest, and the assignees refuse, the Lord Chancellor will upon petition and an offer of indemnity compel them to let him use their names. 590
12. Order in bankruptcy to tax the solicitor's bill for striking the docket and a journey to get an affidavit of debt; being business relating to the bankruptcy,

* Over-ruled, *Ex parte Lambert*, post vol. xiii. 179.

† A similar decision was made by Lord Eldon, Chancellor, in *Ex parte Brown*, 13th June, 1801.

BANKRUPT—continued.

though previous to it. *Ex parte Smith.* 706

13. Assignees of a bankrupt removed on the ground, that one of them had purchased the bankrupt's estates under the commission for himself. A resale was directed; and the purchaser to account for a profit gained by him upon a resale of part: but he was discharged from the purchase only conditionally; in case the resale should produce more. *Ex parte Reynolds.* 707
14. Upon a bankruptcy proof of debt under bond securing an annuity was rejected, on the ground, that a bill accepted for the arrear not being dishonored till after the bankruptcy, the bonds were not forfeited at the bankruptcy. The bonds being void under the Annuity act, there being no enrolment of one, and the consideration of the other not being truly stated, petition to be admitted a creditor for the sums advanced was dismissed on the ground, that the petitioner having insisted on his securities at the date of the commission, it was not the same debt. *Ex parte James.* 708
15. Money paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore a payment by the other on the same account after the bankruptcy cannot be recovered from the bankrupt; who had obtained his certificate; but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution

BANKRUPT—continued.

arose; and the whole was recovered in an action against the bankrupt, who had obtained his certificate; the Defendant not having pleaded in abatement. *Wright v. Hunter.* 792

16. Cross paper, dishonored on each side; both parties being bankrupt: as between the two estates the proof was confined to the cash balance without regard to the dishonored bills. *Ex parte Earle.* 833

See Contingent Interest.

Dower, 2. Insolvent Act.

Jurisdiction, 4. Lien, 1.

Prerogative. Purchaser, 2.

BARON AND FEME.

1. Upon a marriage with a ward of the Court under gross circumstances a proposal for a settlement of the wife's fortune, giving the husband in the event of his surviving her a life interest, was rejected; and the Court refused even to pay out of the accumulation his debts, chiefly contracted in the maintenance of his wife and children. *Chassaing v. Parsonage.* 15

2. Testator having proved the value of annuities, secured to the separate use of his wife, as a debt under the bankruptcy of the grantors, his assets were charged with the dividends only, upon the foot of that transaction, not with the annuities, as subsisting. *M'Lean v. Longlands.* 71

3. A claim by the testator's widow to dividends, to which he was entitled under a bankruptcy, as a gift by him to her separate use, failed; the evidence not even affording a sufficient ground for directing an issue. *M'Lean v. Longlands.* 71

4. Demurrer by a married woman to a bill of discovery of transactions with her as agent to her husband allowed. *Le Texier v. The Margrave of Anspach.* 322

BARON AND FEME—continued.

5. Upon a settlement of the fortune of a ward of the Court, who had married a man of no property, the Court took care to secure a provision for a future marriage. *Wells v. Price.* 398

6. A legacy to a married woman is not sufficiently reduced into possession by an appropriation by the executrix of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. *Blount v. Bestland.* 515

7. Settlement directed of a legacy to a married woman claimed by her husband. *Blount v. Bestland.* 515

8. To prevent the marital right in property of a married woman a clear intention, that it shall be to her separate use, must appear: a mere trust to pay the interest to her for life was held not sufficient: the capital being bequeathed according to her appointment, whether covert or sole, and in default of appointment, to her representatives, including her husband, was admitted to be to her separate use. *Lumb v. Milnes.* 517

9. Bequest in trust to pay the annual produce into the proper hands of a married woman, is a bequest to her separate use. 545

10. The Court refused to enforce a security upon rents and profits, settled in trust to receive and pay them yearly as received to the separate use of a married woman; and upon the circumstances dismissed the bill with cost. *Mores v. Huish.** 692

11. Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, and the administrator, the latter claim-

* See the note, *ante*, 694.

BARON AND FEME—*continued.*

ing to retain towards satisfaction of a debt by bond from the husband to him, it was declared, he was not entitled to retain; but that the Plaintiff's share was subject to a farther provision in favor of her and her children; the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children: regard being had to the extent of her fortune and the settlement already made upon her.
Lady Elibank v. Montolieu.

737

12. Instances of a husband being committed, till his wife should do an act: but where he made it appear he could not prevail upon her, he was discharged.

848

See Agreement, 8. Dower,
1. Jurisdiction, 4. Marriage. Will, 5.

BARRISTER.

See Bankrupt, 1. Practice, 20.

BASTARD.—See Will, 36, 48, 49.

BEQUEST.—See Will.

BIDDINGS.—See Practice, 4, 11, 12.

BILL IN EQUITY.—See Fine, 1.

BILL OF DISCOVERY.

See Practice, 5.

BILL OF EXCHANGE.

See Bankrupt, 8.

BILL OF REVIEW.

See Practice, 14, 15, 19.

BILL OF REVIVOR.

See Practice 14, 15.

BILL PRO CONFESSO.

See Practice, 1, 6.

BILL, TAXED.—See Bankrupt, 12.

BIRTH.—See Domicil, 2.

BOND.—See Annuity, 2. Jurisdiction, 2.

BOND, PRO TURPI CAUSA.

See Consideration.

BOND, VOLUNTARY.

See Consideration.

BOOKS.—See Copyright. Trust, 1.
BOROUGH OF SOUTHWARK.

See Jurisdiction, 6.

BOUNDARIES.—See Charity.

BREACH OF TRUST.—See Trust, 7.

C

CERTIFICATE.—See Bankrupt, 15.

CESTUY QUE TRUST.—See Trust.

CHANCELLOR.—See Bankrupt, 3.

CHANCELLOR OF THE DUCHY OF LANCASTER.

See Practice, 28.

CHANCERY.

The grant of the office of Register of the Court of Chancery for lives in trust for the Duke of St. Albans, his heirs and assigns, descends to the heirs general; and does not follow the title; and being assignable, the claim of the mortgagee was established, but not to the by-gone profits. (See *ante*, vol. iii. 25.) The Duke being trustee, but having obtained possession without title, as heir, the Court, though the Plaintiff was an infant, inclined not to carry the account farther back than the time of filing the bill, if the profits had not been paid into Court at an earlier date in the suit instituted by the mortgagee.
Drummond v. The Duke of St. Albans. 433

CHARGE.

1. Arrangement of charges as to priority. A power, when executed, takes place according to the original deed creating it.
Mosley v. Mosley. 248
2. Charges upon an estate more than sufficient to answer them directed to be raised by mortgages of different parts. *Ib.*
3. An estate having once borne a charge in favor of legatees or

CHARGE—continued.

creditors is discharged; though the fund is misapplied by the trustees. 736

See Implication, 1. Will, 13.

CHARITY.

Under a devise for founding a new college in the University of Cambridge, to be called Downing College, the Crown having at length granted the application for a charter and license, and the University waiving the account against the heir at law, who had been substituted as the trustee, farther back than six years, the Lord Chancellor, doubting his authority to confine it, made the decree accordingly upon the terms of their taking an Act of Parliament to confirm it. A commission was directed to distinguish lands intermixed with those devised to the charity, and a receiver appointed. *The Attorney General v. Bowyer.* 300

CHILD (ILLEGITIMATE). See Will, 36.

CHILDREN.—See Parent. Power. **CHURCHWARDEN.**

See Practice, 20.

CODICIL.—See Will.

COLLEGE (DOWNING).

See Charity.

COLLIERY.—See Trust, 3.

COMMAND OF INDIA SHIP.

See East India Ship. Pleading, 1.

COMMISSION OF BANKRUPT.

See Bankrupt.

COMMISSION OF REVIEW.

See Will, 1, 19.

COMMISSION TO DISTINGUISH LANDS.—See Charity.

COMMISSIONERS OF BANKRUPT.

See Bankrupt, 1.

CONSIDERATION.

Voluntary bond during cohabitation to a woman previously of a very loose life: soon afterwards another bond, expressly securing a continuance of the connection

CONSIDERATION—continued.

by an annuity in case of separation. Bill by the executor to have the bonds delivered up was dismissed with costs: the former being considered unimpeached: the latter void at law as *pro turpi causa*. *Gray v. Mathias.* 286

See Construction, 2.

CONSTRUCTION.

1. An instrument is to be construed without adverting to the nature of its provisions, if legal, or to what they would have been, if a particular case had been contemplated. *Mosley v. Mosley.* 248

2. Articles before marriage for settling real estates of the husband and also all and singular his personal estate of what nature or kind soever: a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should with respect to the objects of the settlement be considered personal: the settlement therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devise according to the articles. A gift by him in his life in consideration of service was not disputed: but under the particular circumstances attending the marriage, and in the case of an infant, the Court appeared to question its validity. *Randall v. Willis.* 262

3. Covenant by a father to give or leave by his will all his personal estate equally among his children does not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute and *bona fide*: but a disposition for the purpose of defeating the covenant can-

CONSTRUCTION—continued.

not stand : therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life and other evidence of a partial intention, to elude the covenant, set aside. *Jones v. Martin.* 266, n.

See Settlement. Will.

CONTINGENT INTEREST.

Bond upon marriage to pay a sum of money to the husband ; which upon certain contingencies to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. Upon his bankruptcy payment was decreed to the assignees. *Studdy v. Tingcombe.* 695

See Vested Interest. Will.

CONTINGENT REMAINDER.

See Purchaser, 4.

CONTRACT.

See Agreement. Purchaser, 3. Will, 40.

CONTRIBUTION.

See Bankrupt, 15. Jurisdiction, 8.

COPYHOLD.

1. The want of a surrender of copyhold estate to the use of the will supplied in favor of a widow against co-heiresses, daughters of the deviser, married, and infant granddaughters by deceased daughters. The Lord Chancellor was of opinion, that in supplying a surrender the Court is to look only to the object, not to the circumstances of the parties ; as, whether the heir has a provision or not. *Hills v. Downton.* 557
2. The ground of supplying the want of a surrender of copyhold estate is a legal or moral obligation. 563

COPYRIGHT.

1. The Plaintiff published a book of roads of Great Britain, comprising Patterson's Road Book, to the copyright of which the Plaintiff was not entitled, with

COPYRIGHT—continued.

improvements and additions obtained by actual survey and otherwise. An injunction to restrain a publication of an edition of Patterson, comprising the Plaintiff's improvements and additions, was refused. *Cary v. Faden.* 24

2. Injunction against a colorable abridgment of The Term Reports among other Law Reports till answer or farther order upon certificate of the bill filed. *Butterworth v. Robinson.* 709

COSTS.

1. No costs to a trustee, whose neglect occasioned the suit. *O'Callaghan v. Cooper.* 117
 2. A creditor being decreed to reconvey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into Court. *Lord Cranstown v. Johnston.* 277
- See Laches, 2. Lunatic, 6. Practice, 19, 26, 27. Trust, 7. Will, 39.

COUNSEL.

See Bankrupt, 1. Practice, 20.

COURT OF DELEGATES.

See Will, 1, 39.

COURT OF EQUITY.

See Jurisdiction.

COURT, PREROGATIVE.

See Will, 1.

COVENANT.

See Agreement. Construction, 2, 3. Penalty.

COVERTURE.—See Baron and Feme.**CREDITOR.**

See Bankrupt. Baron and Feme, 10. Costs, 2. Fraudulent Settlement. Parent and Child, 2. Settlement, 2.

CROWN.—See Prerogative.**CUSTOM.—See York.**

D

DEATH.—See Domicil, 2.

DEBTOR.—See Creditor.

DECLARATIONS.

See Evidence.

DECREE, ENROLLED.

See Laches, 2.

DECREE, PRO CONFESSO.

See Practice, 1, 6.

DEED.

A deed not to be varied by parol evidence of the actual agreement. *Jackson v. Cator.* 688

DELEGATES (Court of)

See Will, 1, 39.

DELIVERY OF POSSESSION.

See Possession.

DEMURRER.

See Pleading. Practice, 27.

DEPOSITIONS.—See Practice, 13.

DEVASTAVIT.—See Retainer, 1.

DEVISE.—See Will.

DEVISEE.—See Representative, 1.

DISCOVERY.—See Bill of Discovery.

DISTRIBUTION (STATUTE OF.)

See Advancement. Will, 35.

DOMICIL.

1. The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicil at the time of his death. For that purpose there can be but one domicil; and the *Lex loci rei sitæ* does not prevail. *Somerville v. Lord Somerville.* 750

2. The mere place of birth or death does not constitute the domicil. The domicil of origin, which arises from birth and connections, remains, until clearly abandoned, and another taken. *Somerville v. Lord Somerville.*

Ib.

3. In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, upon the circumstances the former, which was the original domicil, prevailed. *Somerville v. Lord Somerville.* *Ib.*

DOMICIL—continued.

4. A man may have two domicils for some purposes. 786

5. Distinction upon contemporary domicils: in the case of a nobleman or gentleman, generally, the domicil is the mansion-house in the country: that of a merchant is at his residence in town. 789

6. A new domicil cannot be acquired during pupillage, or until the person is *sui juris*. 787

DOUBLE LEGACIES, PORTIONS, &c.—See Portion. Will, 14, 15, 16, 17, 18.

DOWER.

1. A provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the personal estate of the husband, if precarious and uncertain, as, that the personal estate shall go according to the custom of London, does not bar her. *Smith v. Smith.* 189

2. Dower established against assignees under a joint commission of bankruptcy upon the estates purchased with the partnership fund, but conveyed to one partner under a specific agreement, that the estates should be his, and he should be debtor for the money. *Smith v. Smith.* 189

See Mortgage, 2.

DOWNING COLLEGE.

See Charity.

DUCHY OF LANCASTER.

See Practice, 28.

DYING WITHOUT ISSUE.

See Perpetuity.

E

EAST INDIES.—See Infant Trustee, 1.

EAST INDIA SHIP (Sale of Command.)

The command of an East India ship is a public trust; and the sale of it contrary to a public

EAST INDIA SHIP—continued.

regulation of the Company is a breach of public duty. 181

See Pleading, 3.

ECCLESIASTICAL COURT.

See Jurisdiction, 1.

EJECTMENT.—See Landlord, 1.**ELECTION.**

1. Parties having claims under and against a will must elect. *Wollen v. Tanner.* 218

2. Whether the infant issue of tenant in tail was bound by the election of his parent, *Querc. Long v. Long.* 445

3. Election decreed between two claims under and against a will. *Blount v. Bestland.* 515

See Laches, 1.

ENROLMENT OF DECREE.

See Laches, 2.

EQUITABLE INTEREST.

See Assignment. Insolvent Act.

EQUITABLE JURISDICTION.

See Jurisdiction.

EQUITY OF REDEMPTION.

See Mortgage.

ERROR.

See Account. Practice, 18, 19.

ESTATE, PERSONAL.

See Construction, 2, 3. Exoneration. Personal Estate.

ESTATE, REAL (Charge on).

See Will 13, 31.

ESTATE TAIL.—See Election, 2.**ESTOPPEL.**

Title by estoppel. 831

EVIDENCE.

1. A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his hand-writing. Parol evidence of declarations in conversation was produced for the same purpose: but the Court appeared to rely on the evidence in writing. *Eden v. Smyth.* 341
2. Declarations of a party to a

EVIDENCE—continued.

deed previous to the execution admitted in support of the deed against imputations of fraud: declarations subsequent, impeaching the deed, were rejected. *Conolly v. Lord Howe.* 700

3. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp v. Kemp.* 849

See Agreement; 2. Annuity, 10. Bankrupt, 4. Deed. Satisfaction, 1. Trust, 3. Will, 14, 15, 22.

EXCEPTION.—See Practice, 5.**EXECUTION OF POWER.**

See Power.

EXECUTOR.

1. Executor discharged from a loss under favorable circumstances. *Bacon v. Bacon.* 331
2. Two executors under the circumstances charged with a loss by neglecting to call in money lent by the testator upon bond. *Powell v. Evans.* 839
3. Executors ought not without great reason to permit money to remain upon personal security longer than is absolutely necessary. 844
See Bank of England. Jurisdiction, 1. Representation. Retainer, 1. Trust, 1, 2, 7.

EXONERATION.

1. Upon the purchase of an equity of redemption the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler v. Butler.* 534
2. To exempt the personal estate from the payment of the debts the will must afford a necessary implication; viz. that inference, that leaves no doubt upon the mind of the judge. *Hartley v. Hurle.* 540

EXONERATION—continued.

3. Bequest of personal estate exempt from debts by mortgage: the benefit of the exemption was confined to that legatee; and failed: the bequest having lapsed by the death of the legatee in the life of the testator. *Waring v. Ward.* 670

F

FACTOR.—See Lien.

FATHER.—See Parent and Child.

FEES (ACCOUNT OF).

See Jurisdiction, 6, 7.

FEME.—See Baron and Feme.

FINE.

1. A bill in equity not sufficient to prevent the operation of a fine at law. 238
2. Remainder under an old settlement barred by a fine and non-claim; the fine also working a discontinuance. The Defendants producing the lease for a year and a copy of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment; and in default the bill to be dismissed with costs. *Snell v. Silcock.* 469

See Costs, 1.

FORFEITURE.—See Pleading, 3.

FRANCHISE.—See Jurisdiction, 6.

FRAUD.

1. On the ground of fraud a general account was decreed; and the securities to stand only for the balance; though the vouchers had been destroyed by general consent. *Wharton v. May.* 27
 2. Bill to set aside the sale of a reversion dismissed with costs: the only ground on the evidence being inadequacy of price: and no fraud, &c.; and the bill filed twelve years after the sale. — *Moth v. Atwood.* 845
- See Bankrupt, 13. Construc-

FRAUD—continued.

tion, 2, 3. Costs, 2. Evidence, 2, 3. Principal and Agent, 1, 4.

FRAUDS (STATUTE OF).

See Trust, 3. Will, 11, 39.

FRAUDULENT SETTLEMENT.

To impeach a settlement after marriage under the Statute 13 Elizabeth the husband must be proved to have been indebted at the time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed; with liberty to file another. *Lusk v. Wilkinson.* 384

G

GENERAL ORDER.—In Bankruptcy, see page 578.

GENTLEMEN.—See Domicil, 5.

GIFT.—See Baron and Feme, 3. Construction, 2, 3.

GOODWILL.—See Partner, 1.

GRAND-CHILD.—See Maintenance.

H

HEIR.

See Advancement. Copyhold, 1. Representative.

HOTCHPOT.—See Advancement.

HOUSE OF LORDS.

See Practice, 15. Privilege.

HUSBAND.—See Baron and Feme.

I

ILLEGITIMATE CHILD.

See Will, 36, 48, 49.

ILLUSORY APPOINTMENT.

See Power, 2, 3, 5, 10, 13, 14.

IMPERTINENCE.—See Practice, 24

IMPLICATION.

1. Under a power for raising portions for younger children an appointment by a charge confined to a particular event of four or

IMPLICATION—continued.

more was not extended by implication from general words in a subsequent part of the deed providing for the case of no appointment. *Mosley v. Mosley.* 248

2. Implication in a will cannot prevail, unless necessary. *Upton v. Lord Ferrers.* 801

3. Devise after the death of the devisor's wife; if the devisee is heir, the wife takes for life by implication, otherwise not. 806

See Exoneration, 2. Will.

IMPOSITION.—See Fraud.**IMPROPRIATOR.—See Purchaser, 3.****INDIA.—See Infant Trustee, 1.****INDIA-SHIP (SALE OF COMMAND).**

See East India Ship.

INFANT.—See Construction, 2. Domicil, 6. Dower, 1. Maintenance, 1, 2, 3, 4.**INFANT TRUSTEE.**

1. An infant trustee ordered to convey an estate in Calcutta under the Statute 7 Ann. c. 19. *Ex parte Anderson.* 240

2. Order upon petition under the Statute 7 Ann. c. 19, for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint; but not to convey to a new trustee, upon trusts to be executed, without a bill. *Ex parte Anderson.* 240

INJUNCTION.

Sending a surveyor to mark out trees is a sufficient ground for an injunction. *Jackson v. Cator.* 688

See Copyright. Landlord and Tenant, 1, 2, 3. Practice, 8, 21.

INQUISITION OF LUNACY.

See Lunatic.

INSOLVENT ACT.

Bill by the assignee of a person who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an insolvent act, in respect of the surplus against the assignee, the trustee, and mort-

INSOLVENT ACT—continued.

gagees, dismissed with costs. *Spragg v. Binkes.* 363

INSURANCE.

See Annuity, 9, 10. Bankrupt. 9.

INTEREST.

A written undertaking to pay at a day certain, or on demand, as a promissory note, carries interest from the day, or the demand: as at law it is given by way of damages. *Upton v. Lord Ferrers.* 801

INTEREST, EQUITABLE.

See Assignment.

INTEREST, VESTED.

See Vested Interest.

ISSUE (Dying without).

See Perpetuity.

ISSUE IN TAIL.—See Election, 2.**J****JAMAICA INTEREST.**

See Will, 7.

JOINT COMMISSION.

See Bankrupt.

JOINT CREDITOR.

Under a joint covenant to raise a sum of money the whole may be recovered from either. 717

See Bankrupt, 9.

JOURNALS OF THE HOUSE OF LORDS.—See Privilege.**JUDGMENT (VACATED.)**

A judgment may be vacated, while in paper: but not, when made a record. 705

JURISDICTION.

1. Executrix, in custody under a writ *De excommunicato capiendo* for not appearing to a citation by a creditor to exhibit an inventory, moved for a supersedeas, disputing the debt upon equitable grounds: motion refused. *The King v. Blatch.* 113

2. The jurisdiction assumed by Courts of Law, dispensing with *profert* in the case of a lost bond does not oust the equitable jurisdiction. 283

JURISDICTION—continued.

3. No relief in equity upon a promissory note void at law for want of a stamp. 240
4. An action does not now lie by a husband for a legacy in right of his wife. 516
5. The cases, in which equity orders instruments, to which there is a legal objection, to be delivered up, are rare, and the relief on terms. 618
6. Bill by the bailiff of the city of London, entitled under a grant of Edward VI. of the execution and return of all process in the borough of Southwark, against the sheriff of Surrey for an account of the fees, dismissed. *Leves v. Sutton.* 683
7. Upon a bill by the deputy meters of oysters at Billingsgate, appointed by the city of London, the allowance claimed for metage, &c. of the cargoes brought to market being established as reasonable by the verdict upon an issue, an account and payment of the arrears was decreed. *Milbourn v. Fisher.* 685 n.
8. Though contribution among partners is now enforced at law, the jurisdiction of Courts of Equity is not ousted; and therefore though the bill was dismissed, the object having been obtained in an action directed, the Court would not dismiss it with costs. *Wright v. Hunter.* 792
See Bankrupt, 3. Consideration, 1. Fine, 2. Lunatic, 4. Practice, 8.

K**KIN (NEXT OF).**

See Representative. Trust, 2.
KING.—See Prerogative.

L**LACHES.**

1. Bill against the devisee and per-

LACHES—continued.

- sonal representatives, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the Plaintiff; who eighteen years ago had compromised a suit instituted by him upon the subject; in consequence of which the right to compel an election, depending on a doubtful question on the will, was not ascertained; and the party having possessed under the will during her life had disposed of her estate real and personal by will. *Yate v. Mosely.* 490
2. The Court refused to vacate the enrolment of a decree dismissing the bill with costs by default; and afterwards upon a new bill for the same purpose granted a motion for time to answer till a month after payment of the costs of the other cause; adopting the practice at law. *Pickett v. Loggon.* 702
See Agreement, 4, 5, 6. Costs, 1. Fraud, 2. Mortgage, 4. Presumption, 1. 2. Principal and Agent, 4. Purchaser, 1.
- LANCASTER (DUCHY COURT.)**
See Practice, 28.
- LAND,**
See Power, 9. Real Estate.
- LANDLORD AND TENANT.**
1. Where a tenant defending an ejectment, brought by his landlord makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation on petition: but it was refused, where no ejectment had been brought. *Lathropp v. Marsh.* 259
 2. Injunction granted, to restrain a breach of covenant, secured by forfeiture of the lease and a penalty. *Barrett v. Blagrave.* 555

LANDLORD—continued.

3. Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term upon his conduct : amounting to a consent to the Plaintiff's plan of improvement, laying out the lawn, &c. *Jackson v. Cator.*

688

See Principal and Agent, 4.

LAY IMPROPRIATOR.

See Purchaser, 3.

LEASE.—See Renewal, 1.**LEGACY.**

See Satisfaction, 1. Will.

LEGACY (SPECIFIC.)

See Will, 6, 24, 25.

LENGTH OF TIME.

See Laches. Presumption, 1.

LETTERS.

See Annuity, 10. Evidence,
1. Settlement, 1, 2. Trust,
3.

LEX LOCI REI SITAE.

See Domicil, 1.

LIEN.

A. abroad commissions B. in London to send him foreign coin ; with particular directions as to the manner and times of sending it ; and remits bills ; which B. discounts ; and, the coin required not being to be had in England, sends two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it ; with directions, if it cannot be had, to return bills. The coin not being to be had, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, are returned ; and, B. in the interval becoming bankrupt, are received by his assignees. A. was held to have a lien upon these bills, upon the particular circumstances : the Lord Chancellor expressing much doubt, whether the lien would hold in the case of a remittance to buy goods in the way of trade. *Ex parte Sayers.*

169

See Bankrupt, 6.

LIMITATION OF ACCOUNT.

Account of rents and profits confined to six years by analogy to the action for mesne profits.

Reade v. Reade. 744

See Annuity, 7. Chancery.

Presumption, 2.

LIMITATION, REMOTE.

See Peperuity.

LIVING.

See Advowson. Pleading,

5. Trust, 8.

LONDON.

See Jurisdiction, 6, 7. Practice, 8.

LORD CHANCELLOR.

See Bankrupt, 3.

LORD MAYOR OF LONDON.

See Practice, 8.

LORDS, HOUSE OF.

See Appeal. Practice, 15.
Privilege.

LOST BOND.

See Annuity, 1. Jurisdiction, 2.

LUNATIC.

1. Upon a search of precedents, it was held no objection to the return of an inquisition finding a person lunatic, that it does not state, that the lunatic has or has not lucid intervals. *Ex parte Wragg, Ex parte Ferne.* 450
2. A traverse to the return to an inquisition finding a person lunatic is a right by law : though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse. *Ex parte Wragg, Ex parte Ferne.* 450
3. Manner of pleading a traverse to an inquisition finding a person lunatic. 452
4. The Lord Chancellor cannot upon a petition in lunacy order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by the creditors. *Ex parte Smith.* 556
5. (Ante, 450.) Upon the return of the traverse to the inquisition

LUNATIC—continued.

of lunacy, finding, that the party was a lunatic at the time of her marriage and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded: but the Lord Chancellor doubted the propriety of such a double issue. *Ex parte Ferne.*

382

6. No costs to the party taking out a commission of lunacy, which is traversed with success; however meritorious the case: the property never coming to the possession of the Crown, there is no fund. *Ex parte Ferne.*

832

7. Traverse to an inquisition, finding a person lunatic, is *de jure*, not matter of favor.

833

See Will, 27.

M**MAINTENANCE.**

1. Devise to an infant grandson at twenty-one, with accumulation in the mean time; with similar limitations in case of his death under twenty-one to his sisters. Their father being dead, having left all his property, which was considerable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry, whether it was for the benefit of the infants; the Court judging of that. *Greenwell v. Greenwell.*

194

2. Residuary bequest to a very large amount in favor of infant grandchildren, payable at twenty-one or marriage, with survivorship; the interest to accumulate, and be paid with the capital; and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and

MAINTENANCE—continued.

there being several children, the Court directed maintenance, taking the consent of the mother.

Cavendish v. Mercer. 195 n.

3. Residuary bequest in favor of infant grand-children, payable at twenty-one or marriage, or to the issue of those dead, with survivorship, and accumulation till the time of payment, and a limitation over absolutely in case of the death of all without issue before that time. The father in consequence of bankruptcy being wholly unable to maintain his children, maintenance was directed by the Court, taking the consent of the persons, to whom the property was given over. *Fendall v. Nash.*

197 n.

4. Irregular to confirm reports as to maintenance on motion. 199

5. A direction by will to apply so much interest as might be necessary towards the maintenance and education of the testator's grand-children upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother; their father having by his will left them a considerable property, with a provision for maintenance. *Rawlins v. Goldfrap.*

440

See Parent and Child.

MARITAL RIGHT.—See Baron and Feme.

MARRIAGE.

1. Trust term by will to raise out of real estate portions for daughters, to be paid on marriage, upon condition, that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement, the residue of the personal estate, subject to debts and legacies, to be applied in

MARRIAGE—continued.

discharging the portions in ease of the real estate, or for any purpose the trustees might judge most beneficial for the devisee.

A marriage having taken place with the consent of the mother and the privity of the trustee, but without any settlement, by the neglect of the trustee, the husband having before and after the marriage offered all, that was required of him, and been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon executing the settlement.—*O'Callaghan v. Cooper.* 117

2. Whether marriage of a widower with the sister of his deceased wife, in England voidable, in Scotland is void, *Quære. Snelham v. Bayley.* 534, n.

See Articles, 1. Baron and Feme. Construction, 2. Dower.

MARRIED WOMAN.—See Baron and Feme.

MARSHALLING.—See Assets.

MEMORANDUMS.

See Evidence, 1.

MEMORIAL.—See Annuity.

MERCHANT.—See Domicil, 5.

MESNE PROFITS.—See Limitation of Account.

MISTAKE.—See Will 9.

MONEY.—See Power, 9. Real Estate.

MORTGAGE.

1. Mortgagee having permitted the tenant for life to run in arrear for the interest purchases the estate for life, and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under a bill of foreclosure was charged accordingly. *Lord Penrhyn v. Hughes.* 99

2. Mortgagee may protect himself against a claim of dower by tak-

MORTGAGE—continued.

ing an assignment of an old mortgage term prior to the right to dower. *Wynn v. Williams.* 130

3. A defendant claiming as mortgagee, and by his answer denying notice of the Plaintiff's title, which was neither alleged by the bill nor proved, an inquiry for the purpose of affecting him with notice was refused, first upon a petition to vary the minutes, and again upon a rehearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy v. Reeves.* 426
4. Under a conveyance of a West-India estate, in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent. Therefore the accounts settled with the executors of the mortgagor since his death in 1791 were declared not to be considered settled; the prior accounts to stand; with liberty to surcharge and falsify: but not farther back than 1785. *Chambers v. Goldwin.* 834

See Bankrupt, 3, 11. Chancery. Exoneration, 1. Insolvent Act. Will, 12, 41.

N

NATURAL CHILD.—See Will, 36

NE EXEAT REGNO.

1. Affidavit to support a writ of *Ne exeat Regno* must be positive. *Roddam v. Hetherington.* 91
2. Writ of *Ne exeat Regno*, obtained by a resident here against a resident in the West Indies upon a demand arising there, when the answer came in was discharged under the circumstances, with costs against the

NE EXEAT REGNO—*continued*.
prochein amy of the infant Plaintiff; but upon the admissions in the answer the Defendant was ordered to give security to abide the decree. *Roddam v. Hetherington*. 91

3. The writ of *Ne exeat Regno* issued properly: the subject being matter of account. A general affidavit of belief of the Defendant's intention to quit the kingdom is sufficient, without the circumstances, upon which that belief is founded. *Russell v. Ashby*. 96

4. Upon an application for the writ of *Ne exeat Regno* no subpoena is served: but upon personal service of the writ the party is bound to appear and put in his answer; and then he may apply to supersede the writ; but not upon his affidavit. *Russell v. Ashby*. 96

5. Analogy between the applications for the writ of *Ne exeat Regno* and to a Judge to hold to special bail. 97

6. The writ of *Ne exeat Regno* refused; the circumstances not affording a sufficient ground. *Gardiner v. Edwards*. 591

NEGLIGENCE.—See Laches.

NEXT OF KIN.—See Representative. Trust, 2.

NOBLEMAN.

See Domicil, 5. Privilege.

NON-CLAIM.—See Fine, 2.

NOTE (PROMISSORY).

See Interest. Jurisdiction, 3.

NOTICE.

See Mortgage, 3. Purchaser, 1.

O

OBLIGOR AND OBLIGEE.

See Bond.

OFFICE (REGISTER'S).—See Chancery.

OPENING BIDDINGS.

See Practice, 4, 11, 12.

ORDER.—See General Order.

ORNAMENTAL TREES.

See Landlord and Tenant, 3.

OYSTER METERS.

See Jurisdiction, 7.

P

PARENT AND CHILD.

1. A father may leave his children without a maintenance; and the parish have no remedy against the executor. 444

2. A son, tenant in tail in remainder, when just of age, in 1760, joined his father, tenant for life, in a recovery, for the purpose of raising 3000*l.* for the father, and resettling the estate, the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. Upon that ground a bill by the trustees under a general trust for his creditors, claiming as purchasers under the stat. 27 Eliz. c. 4. was dismissed, without deciding, whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth. *Brown v. Carter*, 862

See Advancement. Construction, 3. Election, 2. Power, 5.

PAROL AGREEMENT.

See Agreement. Evidence.

PAROL EVIDENCE.

See Evidence. Satisfaction, 1.

PARTITION.

Agreement for partition established against a conveyance, and against a devise; operating as a revocation, by depriving the testatrix of all interest in the estate devised. *Knollys v. Alcock*. 648

PARTNER.

1. Real-estate purchased by partnership with partnership funds. *Smith v. Smith*. 193, note (b).
2. The good-will of a trade, carried on in partnership without articles, survives; and is not partnership stock.* *Hammond v. Douglas*. 539
3. Profits, accrued after the death of one partner, are joint property. *Hammond v. Douglas*. 539
See Bankrupt, 2, 4, 5.
Dower, 2. Jurisdiction, 8.
Trust, 3.

PARTY.

Devise to trustees and their heirs to the use of other trustees for 1000 years: upon trust by sale, lease, mortgage, or otherwise, to raise and pay such sum as the personal estate should fall short of the debts; and after raising and paying thereof then in strict settlement. A bill being filed by creditors, the personal estate proving deficient, and the trustees of the inheritance having contracted to sell under a power, upon their supplemental bill, praying the benefit of the accounts against the surviving trustee of the term, though no party to the original cause, that the debts may be paid out of the purchase-money, and that on payment the term may be assigned to the purchasers, it was so decreed; the Defendants not objecting. *Fletcher v. Houghton*. 550.

See Pleading, 3.

PATRON.—See Advowson. Pleading, 5. Trust, 8.

PATTERSON'S ROAD BOOK.

See Copyright, 1.

PAUPER.—See Parent and Child, 1.

PEER.—See Domicil, 5. Privilege.

PENALTY.

The statute 8 & 9 Will. III., remedial for the purpose of recovery

PENALTY—*continued.*

ering successive breaches to the extent of the penalty. 331

See Annuity, 2, 3. Pleading, 3.

PERFORMANCE (SPECIFIC.)

See Agreement. Purchaser, 3.

PERPETUITY.

1. Residue of personal estate bequeathed to the children of the testator's two daughters, their executors, &c. with a limitation over in case both his daughters should die without issue: a vested interest in the grand-children; and the limitation over is too remote. *Rawlins v. Goldfrap*. 440

2. Trust by deed, creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenant in tail. *Mainwaring v. Baxter*. 458

PERSONAL ESTATE.

Personal estate is so fluctuating in its nature, that it is impossible to make every specific article the subject of settlement. 274

See Construction, 2, 3. Domicil. Perpetuity, 1. Power, 9. Will, 11.

PERSONAL REPRESENTATIVE. See Executor. Representative, 1.**PLEADING.**

1. Forty-six years after a decree directing in execution of the trusts of the will a conveyance in fee to the tenant in tail male, having also the reversion in fee, with consent of the only intermediate remainder-man in tail male, a bill was filed against their devisee; the Plaintiffs claiming under an old voluntary grant out of the reversion, the estates tail being spent and no recovery; and praying a discovery and conveyance. A general

* See note, *ante*, 540.

PLEADING—*continued.*

- demurrer was allowed; though the decree and conveyance were stated only by way of pretence, not expressly charged; the whole right as against the Defendants, being founded on that conveyance. *Fletcher v. Tollet.* 3
2. Admission of assets prevents the necessity of setting forth the accounts. *Pullen v. Smith.* 21
3. Bill by the East India Company claiming from a part-owner of a ship, freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charter-party and a by-law of the Company, one moiety to their use, the other to be paid or returned to the person, who shall give the Company information, and make proof; the deed being on settling the account cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject the Defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and to the relief, generally, for want of equity, and for defect of parties, viz. the other part-owners, particularly one, who executed, and the informer, was over-ruled. *East India Company v. Neave.* 173
4. Demurrer both to the discovery and relief, if good as to the latter, shall be allowed as to both; though the Plaintiff may be entitled to the discovery. 185
5. Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up; charging the Defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *McNamara v. —.* 824
- See Lunatic, 5. Mortgage, 3.

POLICY OF INSURANCE.

See Annuity, 9, 10. Bankrupt, 9.

PORITION.

Rule of presuming against double portions. 381

See Articles, 2. Implication, 1 Vested Interest, 4.

POSSESSIO FRATRIS.

A question upon the rule "possessio fratris," &c. depending upon the implication of an estate for life, was not determined.

Wheldale v. Partridge. 388

POSSESSION.

Possession of a house by delivery of the keys. 818

POST OBIT.—See Usury.

POWER.

1. Voluntary bond to pay to and among all such child or children of A. in such parts, &c. as the obligor should by deed or will appoint; and for want of appointment, and as to what should be unappointed, to and among all such child or children of A. as might survive the obligor. Appointment by will of the whole fund to one of six children established. *Wollen v. Tanner.* 218
2. Appointment, giving very small shares to some of the objects set aside, as illusory. *Spencer v. Spencer.* 362
3. The rule as to illusory appointments not to be applied, where a sufficient reason appears upon the face of the appointment; perhaps not, between parent and child, if clearly proved. 363
4. Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times as he should appoint. The power was held well executed by a will directing a sale and appointing the money. *Long v. Long.* 445

POWER—*continued.*

5. An appointment by a father not illusory, where he gives other provisions to the object excluded. *Long v. Long.* 445
6. Power of appointment among three persons executed by a transfer of one third to one under an order on petition; stating, that the person having the power was desirous, that the fund might be equally divided, that person dying without any farther execution, the Court gave the two remaining thirds respectively to another of the objects and to the administratrix of the third; who was dead; but had survived the person executing the power. *Fortescue v. Gregor.* 553
7. Devise in trust to dispose of the premises unto and amongst the devisee's four children, in such manner, shares, &c. as he should by deed or will appoint: one dying in the life of his father, before appointment, was held entitled to a fourth*; the father after that child's death having appointed three fourths to his three surviving children respectively. *Reade v. Reade.* 744
8. Power of appointment does not prevent the interest vesting subject to be devested. 748
9. Difference between land and money subject to a power of appointment. 749
10. Under a power to appoint among several objects each must have a share, and by the rule in equity as to illusory appointments, a substantial share; unless a good reason appears; as, another provision by the person executing the power, not from any other quarter. Under such a power—an appointment of a fund, nearly 1900*l.*, among three children, the objects, 10*l.* to one,

POWER—*continued.*

- 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory. *Kemp v. Kemp.* 849
11. Powers in this Court considered as trusts. 856
12. Power to appoint to the use of such child and children, &c.: an appointment to one or more good. 857
13. Not now the rule, that under a power to appoint among several objects they must take equally, unless a good reason appears. 859
14. A power to appoint among several objects well executed at law by giving each a share, however small. 861
See Charge, 1. Implication, 1. Principal and Agent. Vested Interest, 5. Will, 4, 5.

PRACTICE.

1. The Master of the Rolls refused to make an order under the statute 5 Geo. II. c. 2. for the purpose of having the bill taken *pro confesso*, without an affidavit, according to the eighth section, that Defendant had been in England within two years before the subpoena issued. *Neale v. Norris.* 1
2. Plaintiff in his return from attending a motion against him in the cause was arrested, and a detainer lodged against him in another action: he was discharged from both: the Court examining the parties personally, not by affidavit. *Bromley v. Holland.* 2
3. Admission, that there is standing in the names of the executors upon the trusts of the will a considerable sum in the 3 per cents. and offering an appropriation, was held sufficient to entitle the Plaintiff, a contingent legatee, to move for that purpose; and by consent the

* See the note, *ante*, page 750.

PRACTICE—*continued.*

- order was made, as upon admission of assets sufficient to satisfy the Plaintiff's demand, to transfer, &c. *Pullen v. Smith.* 21
4. Biddings opened after the report confirmed simply upon an advance of 611. on 3051.—351. not sufficient. *Chetham v. Grurgeon.* 86
5. Plaintiff in a bill for discovery only is not entitled as of course to two terms to except to the answer filed in the vacation. *Hewart v. Semple.* 86
6. To obtain an order for taking the bill *pro confesso* under the statute 5 Geo. II. c. 25. the affidavit must state, that the Defendant has been in England within two years before the subpoena. *Bishop of Winchester v. Beaver.* 113
7. Service of an order of sequestration *nisi*, upon the Clerk in Court good; the Plaintiff having tried in vain to serve it personally. *Marquis of Lothian v. Garforth.* 113
8. Injunction in pressing cases upon petition and affidavit. In this instance, converting old houses in London to a purpose, that made them dangerous to the public, the Lord Chancellor granted the injunction: but said, the Lord Mayor by his general jurisdiction could apply a much more proper and effectual remedy. *The Mayor, Commonalty, and Citizens of London v. Bolt.* 129
9. Service on the Defendant's wife ordered to be deemed personal service on the Defendant; and upon that service ordered, that he stand committed for breach of the injunction. *Sir William Pulteney v. Shelton.* 147, 280, n.
10. Service by sending a subpoena to the Defendant under cover to the person, to whom he had directed his letters to be sent,

PRACTICE.—*continued.*

- ordered to be good service. *Hunt v. Lever.* 147
11. Biddings opened on advance of 2001. upon 32001.; but 1001. was held too little. *Anonymous.* 148
12. Under a decree for payment of debts out of cash in the bank the Accountant-General was ordered to pay the executor of a creditor by simple contract under a probate in the diocese, where he had resided: without a prerogative probate; the sum being small; and no *bona notabilia* out of that diocese. *Sweet v. Partridge.** 148
13. Motion to amend depositions after publication refused. *Ingram v. Mitchell.* 297
14. The defendant dying after service of the subpoena to hear judgment, whether upon a bill of revivor a new subpoena to hear judgment is necessary, *quære.* *Byne v. Potter.* 305
15. When an appeal is abated in the House of Lords, the order to revive is obtained of course: and there is no fresh summons. 305
16. The Master may proceed *de die in diem* without an order. *Sturdy v. Lingham t.* 423
17. Plaintiff may except to the report, and at the same time set down the cause for farther directions. *Yeo v. Frere. Bowerbank v. Collasseau* 424
18. A re-hearing is the proper mode of impeaching a decree not signed and enrolled for error. *Bolger v. Mackell.* 509
19. Costs of course upon a bill of review for error; where no error in the decree. *Ib.*
20. Bill by a former churchwarden against the parish officers, trustees for an estate for the poor of the parish, and forty inhabi-

* Over-ruled; see note, page 184.

† Over-ruled; see note, page 423.

PRACTICE—continued.

- tants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment. Upon demurrer the Lord Chancellor expressed a strong opinion against such a bill: and as it appeared not to be signed by Council, ordered it be taken off the file, and the Plaintiff to pay the costs. *French v. Dear.* 547
21. On motion at the last Seal after Trinity Term, to make absolute an order to dissolve an injunction *nisi*, the Plaintiff cannot have time till the next day of motions upon the usual undertaking to show cause on the merits; but was permitted to show cause during the petitions. *Robinson v. Walcott.* 552
22. The Court of King's Bench refused to answer a case from the Rolls stated as a trust. *Parsons v. Parsons.* 578
23. Biddings opened for a person, who was present at the sale. *Tait v. Lord Northwick.* 655
24. After an order for time to answer the bill may be referred for scandal, but not for impertinence.* *Anonymous* 656
25. Upon a motion for a commission to take defendant's examination the time is left to the Master, not limited by the order. *Hairby v. Emmet.* 683
26. The simple fact, that the Plaintiff is gone abroad is not a sufficient ground to compel him to give security for costs. *Hoby v. Hitchcock.* 699
27. Demurrer allowed in the Exchequer upon argument, with 30s. costs: in another suit in Chancery between the same parties and to the same effect it was ordered on motion, that the Defendant should have time to answer till payment of those costs, but without prejudice to

PRACTICE—continued.

- an application to dismiss the bill. *Holbrooke v. Cracraft.* 706, n.
28. Appeal to the Chancellor of the Duchy of Lancaster from a decree of the Vice-Chancellor dismissing the bill, affirmed by him on a rehearing on the petition of the Plaintiff. *Omerod v. Hardman.* 722
29. Bill for specific performance of a contract for sale of an estate upon various objections to the title dismissed in the first instance without a reference.* *Omerod v. Hardman.* 722
30. Relief not specifically prayed, within the general relief. 495
See Bankrupt, 6, 15. Copyright, 2. Laches, 2. Landlord and Tenant, 1. Lunatic, 3. Maintenance, 1, 2, 3, 4. *Ne exeat Regno.* 1, 3, 4. Pleading, 3. Will, 39.

PRAYER.—See Practice, 30.**PREROGATIVE.**

In the case of a debt due to the Crown by a bankrupt the Crown will seize, if they can, before assignment. 297

See Commission of Review.

PREROGATIVE COURT.

See Will, 1.

PREROGATIVE PROBATE.

See Practice, 12.

PRESENTATION TO A LIVING.

See Advowson. Pleading, 5. Trust, 8.

PRESUMPTION.

1. A conveyance decreed, subject to an annuity charged on the estate; the annuitant having gone to Newry in Ireland sixteen years ago; and no payment made or account obtained of her since. *Mainwaring v. Baxter.* 458
2. Upon possession for many years, the origin of it not appearing, and no title except as *Cestuy que trust* under a term to raise

* See the notes, *ante*, pages 188, 737.

PRESUMPTION—continued.

a sum of money, the Court would not presume any other title; and therefore decreed the Plaintiff to be let into possession on payment of the charge; but with reluctance; and on account of the laches refused an account of the rents even from the filing of the bill. *Acherley v. Roe.* 565

See Portion, 1. Purchaser, 1, 3. Satisfaction, 1. Will, 14, 15, 16, 17, 18.

PRINCIPAL AND AGENT.

1. On suspicious circumstances in the answer a general account was decreed against a steward, notwithstanding a receipt in full; which was allowed only as proof of the particular payment, not of a general release or discharge on an account stated; though under circumstances it might have that effect: 'as upon proof, that the principal never would give any vouchers, and an account kept by the steward. *Middleditch v. Sharland.* 87

2. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout v. Goldsmid.* 211

3. By the Civil Law, as well as by the law of England, if a person is acting *ex mandato*, those dealing with him must look to his authority. 213

4. Accounts opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. The character of the Defendant, as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the Plaintiff in not bringing forward the demand at an earlier period. *Beaumont v. Boulthbee.* 485

See Bankrupt, 15. Baron

PRINCIPAL AND AGENT—continued.

and Feme, 4. Lien. Mortgage, 4.

PRINCIPAL AND SURETY.

See Evidence, 1. Joint-Creditor.

PRIORITY.

See Charge, 1. Mortgage, 2.

PRIVILEGE.

Whether the Journals of the House of Lords delivered to a Peer go with the title, *Qu. Up-ton v. Lord Ferrers.* 801

See Practice, 2.

PROBATE.

See Evidence, 3. Practice, 12.

PROCESS.—See Jurisdiction, 6.

PROFERT.—See Jurisdiction, 2.

PROMISSORY NOTE.—See Interest. Jurisdiction, 3.

PROMOTIONS.—See pages 1, 870.

PUBLICATION.—See Practice, 13.

PUBLIC TRUST.

See East India Ship.

PUPILAGE.—See Domicil, 6.

PURCHASER.

1. Account of arrears of an annuity decreed against a purchaser with notice: the length of time not being sufficient to raise a presumption of satisfaction. *Wynn v. Williams.* 130

2. A purchaser under a bankruptcy must take such title as the bankrupt had, and cannot insist upon a title strictly free from objection, as in other cases.* In such a case the purchaser objecting to the title, but insisting on his purchase, his bill for a specific performance was under the circumstances dismissed with costs, except as to some part of the answer and the depositions containing irrelevant matter. *Pope v. Simpson.* 145

3. Upon a late decision of the Court of Exchequer, that a presumption from non-payment of tithes

* Over-ruled; see the note, *ante*, page 147.

PURCHASER—continued.

cannot bar even a lay-impropriator, the Lord Chancellor though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for a specific performance.* *Rose v. Calland.* 186

4. A purchaser not compelled to take a doubtful title: nor will a case be directed without his consent. The Court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life; there being no trustees to support them. *Roake v. Kidd.* 647

See Agreement, 4. Exoneration, 1. Mortgage, 2. Parent and Child, 2. Practice, 29.

PURCHASER BY AUCTION.

See Agreement, 3.

Q

QUORUM COMMISSIONER OF BANKRUPT.—See Bankrupt, 1.

R

REAL ESTATE (CHARGE).

See Power, 9. Will, 13, 31.

RECEIPT.—See Principal and Agent, 1.

RECORD.—See Judgment.

REDEMPTION.

See Annuity. Mortgage.

REGISTER'S OFFICE.

See Chancery.

REHEARING.—See Practice, 19.

RELATIONS.—See Will, 35.

RELIEF.—See Practice, 30.

REMAINDER.—See Fine, 2.

REMAINDER, CONTINGENT.

See Purchaser, 4.

* See the note, *ante*, page 188.

REMOTE LIMITATION.

See Perpetuity.

RENEWAL.

(See *ante*, vol. iv. 24.) Upon an inquiry directed on a rehearing, the Plaintiff appearing to have consented to the former renewal in 1786, the Defendant was held entitled to charge 500*l.* towards the fine upon that as well as all other renewals: and the decree was varied accordingly. *White v. White.* 554

RENTS AND PROFITS.

See Limitation of Account.

REPORTS.—See Copyright, 2.

REPRESENTATIVE.

1. No equity between the heir or devisee and personal representative to convert property from the state, in which it is found at the death. 303

2. To convert real or personal property, as between real or personal representatives, from the state, in which it is found at the death, the character of land or money must by the trust, covenant, &c. be imperatively and definitively affixed to it: otherwise, if there was an option, there is no equity. The bill by the heir claiming the personal property, as real estate, was dismissed without costs. *Wheldale v. Partridge.* 388

RESIDUE.

See Satisfaction, 1. Trust, 2.

RETAINER.

Retainer allowed to one executor out of a legacy to his co-executor in respect of a *devastavit*. *Sims v. Doughty.* 243

See Baron and Feme, 11.

REVIEW (BILL OF).

See Practice, 19.

REVIEW (COMMISSION OF).

See Will, 1, 39.

REVIVOR.—See Practice, 14, 15,

REVOCATION.

See Partition, 1. Will, 10, 21, 23, 40, 41, 43.

ROAD-BOOK.—See Copyright, 1.

S

SALE BY AUCTION.

See Agreement, 3.

SALE OF THE COMMAND OF AN INDIA SHIP.

See East India Ship Pleading, 3.

SATISFACTION.

Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter; and parol evidence of an intention to satisfy cannot be admitted originally, as it may, where first introduced to repel a presumption. *Freemantle v. Bankes*.

79

See Purchaser, 1. Will, 14, 15, 16, 17.

SCANDAL.—See Practice, 24.

SCOTLAND.—See Marriage, 2.

SECURITY FOR COSTS.

See Practice, 26.

SEPARATE COMMISSION.

See Bankrupt.

SEPARATE USE.

See Baron and Feme.

SEQUESTRATION.—See Practice, 7.

SERVICE.—See Practice, 7, 9, 10.

SET OFF.

Equitable set-off upon mutual credit, though no mutual debts, upon which a set-off could be maintained at law. *James v. Kynier*.

108

SETTLEMENT.

1. Settlement reformed in favor of the younger children against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention. *Barstow v. Kilvington*.

593

2. Settlement after marriage reformed in favor of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement: but

SETTLEMENT—continued.

this equity did not prevail against creditors. *Jenkins v. Quinchant*.

596, n.

3. Settlement to such uses as the husband and wife shall jointly appoint, and in default of such appointment, to them for life, and after the decease of the survivor to the use of all or any of the child or children of them in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times, and in such manner and form, as the husband should by deed or will appoint; and in default thereof to him and his heirs. The event, upon which the last limitation depends, is default of appointment, not of children. *Jenkins v. Quinchant*.

596, n.

See Agreement, 1. Articles Construction, 2. Contingent Interest, 1. Fraudulent Settlement.

SHERIFF.—See Jurisdiction, 6.

SHIP.—See East India Ship.

SOLICITOR.—See Bankrupt, 12. SOUTHWARK.

See Jurisdiction, 1.

SPECIFIC BEQUEST AND DEVISE.

See Trust, 2. Will, 3, 6, 24, 25.

SPECIFIC PERFORMANCE.

See Agreement. Purchaser, 3.

SPIRITUAL COURT.

See Jurisdiction, 1.

STALE DEMAND.—See Laches.

STAMP.—See Jurisdiction, 3.

STATUTE OF DISTRIBUTIONS.

See Advancement. Will, 35.

STATUTE OF FRAUDS.

See Will, 11.

STEWARD.

See Principal and Agent.

SUBPENA.—See Practice, 14.

SUCCESSION.—See Domicil.

SUPPLY OF SURRENDER.

See Copyhold.

SURETY.

See Principal and Surety.

SURPLUS.

See Satisfaction. Trust, 2.

SURRENDER.—See Copyhold.

SURREY.—See Jurisdiction, 6.

SURVIVORSHIP.

See Baron and Feme, 6. Partner,
1. Will, 32, 44.

T

TAIL.—See Election, 2.

TAXING BILL.

See Bankrupt, 12.

TENANT.

See Landlord and Tenant.

TENANT FOR LIFE.

The old rule imposing upon the tenant for life a gross sum part of the capital of incumbrances, is at an end; but he takes subject to all the interest. 107

See Purchaser, 3.

TENANT IN COMMON.

See Will, 32.

TENANT IN TAIL.

See Perpetuity, 2.

TERM REPORTS.

See Copyright, 2.

TESTAMENTARY PAPER.

See Will, 1, 10.

TITHES.

1. An account of tithes is consequential upon the legal right; and therefore if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed, till the right is established at law. *Fozcroft v. Parris.* 221
2. Bill for tithes. Answer admitting the right to one third, and submitting to account, and claiming the other two thirds under a title derived from a grant by Queen Elizabeth; submitting to be examined upon interrogatories, but not setting forth a description of the lands. The Defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally: the Plaintiff

TITHES—continued.

pressed for a general account. The Master of the Rolls decreed an account as to one third; and as to two thirds, the Plaintiff declining to try the right at law, dismissed the bill. *Fozcroft v. Parris.* 221

See Purchaser, 3.

TITLE.

See Practice, 29. Purchaser, 3, 4.

TRADE.—See Domicil, 5. Partner.

TRAVERSE OF INQUISITION.

See Lunatic, 1, 2, 3, 5, 6, 7.

TREES.

See Injunction, 1. Landlord, 3.

TRUST.

1. Executor in trust for infants having paid under a written obligation, executed abroad, though in possession of a counter obligation to repay part with interest at the death of the party, acknowledging that to be so much more than the debt, and neither instrument having been transferred, was charged as having paid incautiously, though innocently; and therefore he was permitted to try the question at law. *Vez v. Emery.* 149
2. Executors having legacies of 20*l.* a-piece to buy mourning rings and equal specific legacies, were upon the former held trustees of the undisposed of residue for the next of kin. *Nisbett v. Murray.* 149
3. (See *ante*, Vol. III. 696.) The Lord Chancellor upon appeal affirmed the decree upon the points decided at the Rolls, and held farther, that the case was not within the statute of frauds: the question being, whether a partnership subsisted in the trade of a colliery, a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing as an incident to the trade by operation of law; and the evidence from

TRUST—continued.

- books and letters was admitted, and an issue refused. *Forster v. Hale*. 308
4. A general devise by a trustee did not pass the trust estate. *The Attorney General v. Bul-ler*. 330
5. There is no rule, that a trustee to sell cannot be purchaser: but, however fair the transaction, it must be subject to an option in the *Cestuy que trust*, if he comes in a reasonable time to have a re-sale; unless the trustee to prevent that purchases under an application to the Court. *Campbell v. Walker*. 678
6. One of the trustees under an Act of Parliament being gone abroad, and having released, there being no provision for the charge of the trustees, upon a bill it was referred to the Master to appoint a new trustee. *Buchanan v. Hamilton*. 722
7. Executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, the *cestuys que trust* have an option to have the stock replaced, or the money produced by the sales, with interest at 5 per cent., or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock v. Red-dington*. 794
8. Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the Court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground: but the Court will take care as to the future, that the trust shall be properly filled up. *Attorney General v. Bishop of Litchfield*. 825

See Bankrupt, 13. Costs, 1.
East India Ship. Execu-

TRUST—continued.

tor, 4. Infant Trustee. Mortgage. Party. Power, 11. Practice, 20, 22. Vested Interest, 5.

U

USE AND OCCUPATION.

See Limitation of Account.

USURPATION.—See Adwoson.

USURY.

Post obit bonds, though upon terms of gross inequality, established; such securities not being liable to be impeached on the ground of usury. *Wharton v. May*. 27

V

VACATING JUDGMENT.

See Judgment.

VENDOR AND VENDEE.

See Agreement.

VESTED INTEREST.

1. A clear vested interest not de-vested: the express contingency, upon which it was to be de-vested, not having happened. *Harrison v. Foreman*. 207
2. Legacy in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the mean time have happened to him, so as to deprive him, or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family: but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labor under the effects of any misfortune in trade: but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before)

VESTED INTEREST—continued.

to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife, and children, for his life; and if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife, and children, according to his appointment by will; and, if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him; the trustees and his children not opposing it: but the Court observed, that if he should not be discharged, as, in case it should end in bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner.* 306

3. Under a disposition by will to the children of A. and B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. and B. it was held, that all the children without restriction were entitled; and an apportionment being directed, and the interest ordered to be paid, to those, who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest. *Mills v. Norris.* 385

4. Portions by marriage settlement, to be paid, transferred, or assigned, to the sons at twenty-one, to the daughters at twenty-one or marriage, if after the death of their parents; with survivorship among them, if any should die before the share or shares should become payable, assignable, or transferable, and a limitation over, if there should be no child or children living at the death of the survivor of the

VESTED INTEREST—continued.

parents, or, being such, all should die, before the fund should become so as aforesaid payable, assignable, or transferable. Whether a child attaining twenty-one takes a vested interest in the life of the parent, *quære.* *Legh v. Haverfield.* 452

5. (See *ante*, vol. iv. 708.) The decree affirmed on a rehearing. *Brown v. Higgs.* 495

See Power, 8. Will.

VICE CHANCELLOR OF THE DUCHY OF LANCASTER.

See Practice, 28.

VOLUNTARY BOND.

See Consideration.

VOLUNTARY SETTLEMENT.

See Parent and Child, 2.

W**WARD OF CHANCERY.**

See Baron and Feme, 1, 5.

WEST INDIA INTEREST.

See Will, 7.

WEST INDIES.

See Costs, 2. Mortgage, 4. Will, 3.

WIDOW.—See Copyhold, 1.**WIFE.—See Baron and Feme.****WILL.**

1. Upon a commission of review, the sentences of the Court of Delegates and of the Prerogative Court, establishing a testamentary paper as the will, were reversed. *Mathews v. Warner.* 23

2. Bequest to the testator's wife for life: then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests; a codicil in favor of the same objects, only restrained to those surviving at the time of distri-

WILL—continued.

- bution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton v. Messenger.* 136
3. Residuary disposition of all the testator's real and personal estate in Jamaica, in trust to be remitted to England, was held specific, and not to include a debt, originally upon bond and judgment in Jamaica, and afterwards farther secured upon bond and judgment in England, under which it was received, and being considered undisposed of was applied in the first instance to the debts, &c. *Nisbett v. Murray.* 149
4. Power attempted to be executed by invalid instruments held not executed by the general words of a will containing no reference to it. *Mac Leroth v. Bacon.* 159
5. Power to appoint for the benefit of a married woman and her family would not include the husband in general: but upon the whole will an appointment in his favor was established. *Mac Leroth v. Bacon.* 159
6. Legacy general, notwithstanding an appropriation of part of the property. *Raymond v. Brodbelt.* 199
7. Legacy of a sum of money Jamaica currency decreed with Jamaica interest from the death of the testator. *Raymond v. Brodbelt.* 199
8. Bequest to A. for life, and after her decease to B. and C. in equal moieties; and in case of the decease of either in the life of A. the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harison v. Foreman.* 207
9. The rule of construction of wills is, that if the general in-

WILL—continued.

- tention can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake: not otherwise; and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims v. Doughty.* 243
10. Construction of several testamentary papers, that some revoked others: probate having been granted of all. *Beauchamp v. The Earl of Hardwicke.* 280
11. The Lord Chancellor of opinion, that it is expedient to apply the provisions of the Statute of Frauds as to devises to wills of personal estate. 286
12. Lands originally held under old mortgages passed by a general devise; though no release of the equity of redemption appeared. *The Attorney General v. Bowyer.* 300
13. As to the difference between debts and legacies in an implied charge on real estate by will, *quare.* 362
14. A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. *Osborne v. The Duke of Leeds.* 369
15. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, *quare.* *Osborne v. The Duke of Leeds.* 369
16. If a testator by will gives 2000*l.* a-year by way of jointure to any woman he might marry, and after marriage by codicil gives his wife the same jointure, she cannot claim both. 382
17. Double legacies by two instruments upon the intention. 382
18. Small circumstances will raise an inference against double legacies. 384

WILL—*continued.*

19. Testator bequeathed 5000*l.* in trust for his daughter A. for life, and after her decease for such child or children as she shall leave at her decease in such shares as she should think proper; and in case she shall die leaving no child, (which was the event), then as to 1000*l.* for her executors, administrators, or assigns; and as to the remaining 4000*l.*, in trust for such person or persons "as shall be my heir or heirs at law." The 4000*l.* vested in A. and the other two daughters of the testator, being his co-heiresses at law and next of kin at his death. If that union of characters had not occurred, *quare*, whether the next of kin could not claim; and supposing the heirs intended, what description of heirs. *Holloway v. Holloway.* 399
20. *Prima facie* words must be understood in their legal sense, unless by the context or express words plainly appearing intended otherwise. 401
21. Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts; and subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise; and therefore extending to the estates to be purchased with the personal estate. *Lord Carrington v. Payne.* 404
22. A subscribing witness to a will,

WILL—*continued.*

- disposing of real estate, being in Jamaica, his evidence was dispensed with. *Lord Carrington v. Payne.* 404
23. A testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.*, given by the will: as to the effect of the codicil, *Quære.* *Lord Carrington v. Payne.* 404
24. Legacies declared specific upon clear words, and an abatement of the general legacies directed. *Barton v. Cooke.* 461
25. The general personal estate not specifically bequeathed applied first in payment of all the costs, except of inquiries as to a guardian and maintenance for a specific legatee, and then to the general legacies. *Barton v. Cooke.* 461
26. Legacy for the board and education of an infant, until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee: the infant having attained nineteen, and not having been put out, was held entitled to the legacy. *Barton v. Cooke.* 461
27. If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way, as if it was to put him into orders, and he became a lunatic. 463
28. Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child

WILL—continued.

that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares, but upon the death of the last survivor without a child his shares, both original and accrued, are undisposed of; notwithstanding another has left a child. *Milsom v. Awdry*. 465

29. General devise of all manors, messuages, lands, tenements, and hereditaments, in the county of York or elsewhere, with long limitations in strict settlement; and a residuary disposition of the personal estate also by very general words. The Lord Chancellor was clearly of opinion, that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case. *Thompson v. Lawley*. 476

30. General residuary clause in a will passes what is not well disposed of. 501

31. The rule taken from the Ecclesiastical Court, that a direction postponing the payment of a legacy does not prevent the vesting, prevails in Courts of Equity as to personal legacies: unless a contrary intention can be inferred; as where the time of payment forms part of the description of the person to take. The vesting of a residuary bequest is especially favored, to prevent an intestacy; and a direction, that the interest should accumulate, and be paid with the capital, after a deduction for maintenance and preferment, is not sufficient to prevent it. As to real estate the contrary rule prevails, but subject to exceptions. *Bolger v. Mackell*. 509

32. Bequest to be equally divided share and share alike: they take in common; and no survivorship. *Bolger v. Mackell. ibid.*

WILL—continued.

33. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn: a subsequent direction, that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under twenty-five the accumulation belonging to his personal representative.—*Montgomerie v. Woodley*. 522

34. The testator bequeathed a legacy to his daughter, to be paid within twelve months after his decease: but if she should marry A. then he revoked the legacy. She remained unmarried till about fourteen months after the testator's death; and then married A. They obtained a decree for the legacy. *Osborn v. Brown*. 527

35. Legacy for a mourning ring to each of the testator's relations by blood or marriage confined to the Statute of Distributions, and those who have married persons entitled under it. *Devisme v. Mellish*. 529

36. An illegitimate child not entitled to share under a devise to children generally; notwithstanding a strong implication upon the will in favor of that child. *Cartwright v. Vawdry*. 530

37. Testator gave, devised, and bequeathed, all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his moneys in the funds, to trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein: and declared the trust of the rents, issues and profits, dividends, interest and proceeds, subject to

WILL—*continued.*

- ground rents and other outgoings in respect of his said messuages, lands, &c. : the leasehold estates pass with the freehold upon the subsequent words. *Hartley v. Hurle.* 540
38. A contingent legacy failed: the event, which happened, not being provided for; and no necessary implication in favor of the legatee. *Parsons v. Parsons.* 578
39. The prerogative of granting a commission of review is to be exercised upon the peculiar circumstances and the importance of the case. In this instance, a sentence of the Court of Delegates setting aside a will, the report of the Lord Chancellor was against the application: his Lordship concurring upon the evidence, that the will was obtained, or an alteration prevented, by undue influence: and there being no question of law. Upon this proceeding no costs are given. *Ex parte Fearon.* 633
40. Devise revoked by a contract for sale. 654
41. A devise is not revoked by a mortgage in fee to the devisee. *Baxter v. Dyer.* 656
42. Whether a will was revoked by marriage and the birth of a child under particular circumstances, *quære.** 663
43. The testator having given his wife the option to occupy his house at a certain rent, and if she should choose to do, declared, she should have the use of the furniture, by codicil, revoking the bequest of an annuity to her, gave her a legacy, to provide furniture, in case she should not choose to occupy his house, or for any other purpose

* See the note, *ante*, page 664.WILL—*continued.*

- she should think proper. She occupied the house and furniture till her death; and her executor was held entitled to the legacy. *Isherwood v. Payne.* 677
44. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse; and did not prevent the legacies vesting. *King v. Taylor.* 806
45. Construction of a very inaccurate will, that the words "and all I am possessed of" were confined to a specific bequest of stock immediately preceding; meaning all interest in that fund; and did not comprise the general residue; which was by a subsequent clause expressly disposed of in a different manner. *Wilde v. Holtzmeyer.* 811
46. The words "all I am possessed of" in a will in legal construction relate to the time of the death, not of the execution of the will; unless explained. 816
47. Some sense to be given to every part of a will, if consistent with other parts: the legal sense, if possible. 818
48. Illegitimate children having acquired that character by reputation, may take under a will, as by necessary implication intended and described. *Snelham v. Bayley.* 534, n
49. Bequest to the children of A. described spinster, and nothing on the face of the will showing, that illegitimate children were intended: Inquiry, whether she left illegitimate children refused. *Osmond v. Tindall.* note. 534c.
- See Baron and Feme, 9.
Election. Evidence, 1, 3.
Implication. Jurisdiction,
4. Maintenance, 1, 2, 3,

WILL—*continued.*5. Perpetuity. Power.
Trust. Vested Interest.

WITNESS.—See Evidence.

WRIT OF NE EXEAT REGNO.

See *Ne exeat Regno.*

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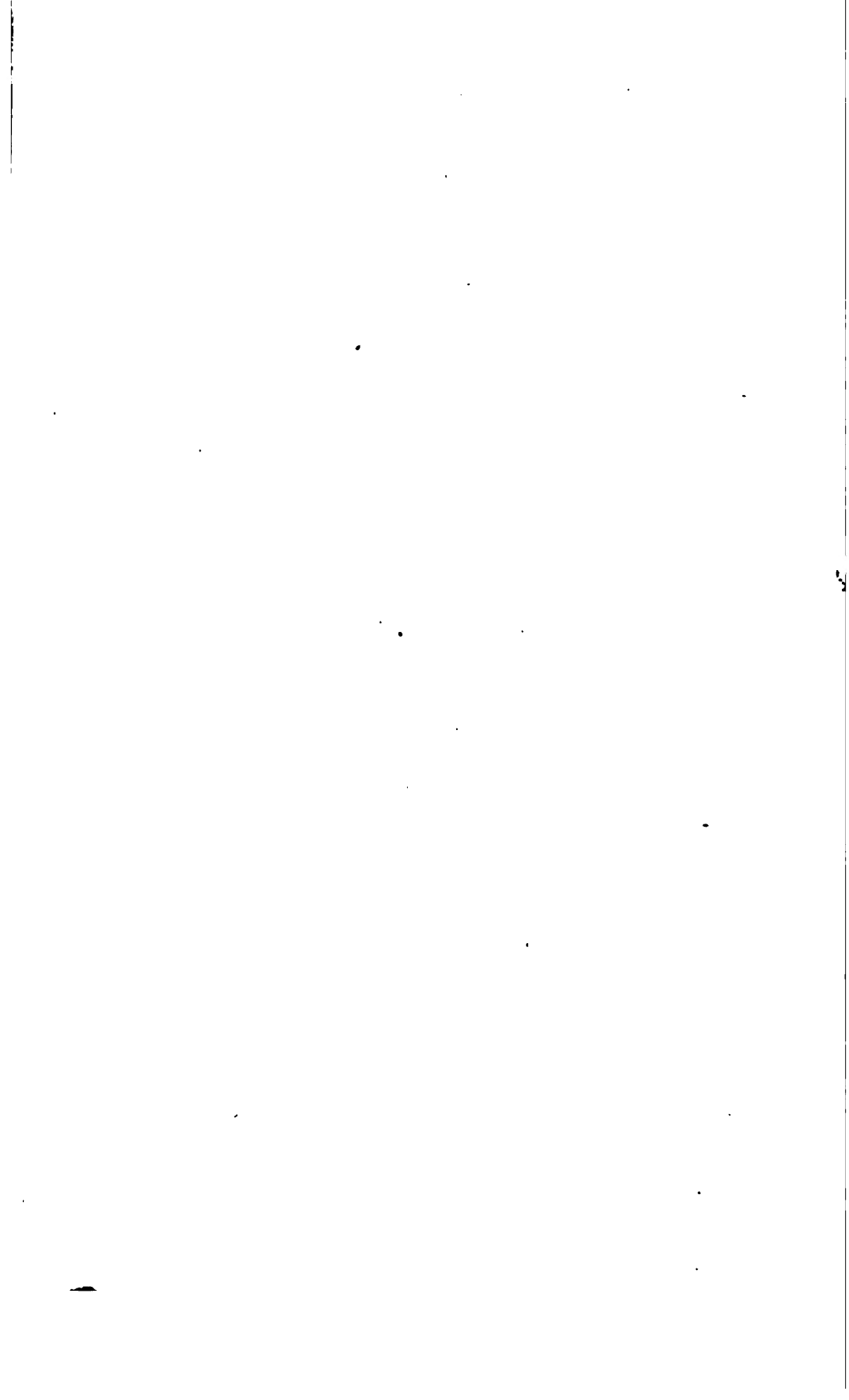
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